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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION, PETITIONER,

vs.

MARTIN C. EPSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 139 Misc.

IDLEWILD BON VOYAGE LIQUOR CORPORATION, PETITIONER,

vs.

HONORABLE ALEXANDER BICKS ET AL., JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR WRIT OF MANDAMUS

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI FILED JUNE 7, 1961

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1961

INDEX

	PAGE
Complaint	1a
Exhibit A Ruling of Treasury Department, Bureau of Customs, and Section 311 of Tariff Act of 1930 (19 U. S. C. §1311)	15a
Exhibit B Opinion of Attorney General of the State of New York, Dated June 30, 1960	21a
Exhibit C Letter of State Liquor Authority, Dated July 11, 1960	25a
Exhibit D Letter of New York State Department of Taxation, Dated August 2, 1954 and Section 424 (1)(f) of New York State Tax Law	26a
Exhibit E Section 3, Subdivision 28, Section 62 and Section 100, Subdivisions 1 and 2, of Alcoholic Beverage Control Law of the State of New York	28a
Exhibit F Section 121 of Alcoholic Beverage Control Law of the State of New York	30a
Application of Plaintiff for Convening of Three-Judge Court	32a
Order to Show Cause for Three-Judge Court and Preliminary Injunction, Dated July 22, 1960	33a

PAGE

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order, Dated July 22, 1960 35a

Notice of Motion of Defendants to Dismiss Complaint, Dated July 25, 1960 42a

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, Dated August 1, 1960 44a

Opinion and Order of Judge Bicks, Dated November 4, 1960 49a

Notice of Appeal, Dated November 16, 1960 56a

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960 57a

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960 59a

Exhibit A
Subpoena Duces Tecum 69a

Exhibit B
Opinion and Order of Judge Bicks, Dated November 4, 1960 49a

Exhibit C
Notice of Appeal, Dated November 16, 1960 56a

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960 71a

PAGE

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960 73a

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960 78a

Supplemental Affidavit of John F. Kelly in Support of Plaintiff's Motion, Verified December 5, 1960 80a

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960 82a

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960 84a

Notice of Entry of Stay Orders 86a

Opinion of Judge Dimock, Dated December 28, 1960 88a

Order of Judge Dimock, Dated January 4, 1961 93a

Plaintiff's Notice of Appeal from Decision and Order of Judge Dimock, Dated January 6, 1961 96a

Notice of Motion to Dismiss Appeal 97a

Memorandum of Points 98a

Notice of Motion to Dismiss Appeal 99a

PAGE

Memorandum of Points 100a

Order 101a

Order 102a

Opinion of the Court of Appeals for the Second Circuit 103a

Judgment of Court of Appeals, Dated April 14, 1961 116a

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin 117a

Affidavit of Charles H. Tuttle in Support of Plaintiff's Application 120a

Restraining Order Issued by Judge Cashin on April 25, 1961 128a

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York 130a

Order to Show Cause for a Stay Pending Appplication for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit 136a

Affidavit of Charles H. Tuttle in Support of Idlewild's Application 139a

Stay Order of Court of Appeals, Dated May 8, 1961 144a

Stay Order of Court of Appeals, Dated May 10, 1961 145a

PAGE

Petitioner's Notice of Alternative Application for an Order Recalling and Amending the Mandate of the Court of Appeals for the Second Circuit 146a

Injunction Order of the United States Court of Appeals for the Second Circuit, Dated May 15, 1961 147a

	Original	Print
Clerk's certificate (omitted in printing)	148	148
Order allowing certiorari	149	148
Order granting motion for leave to file a petition for writ of mandamus	150	149
Order of substitution	151	150

APPENDIX

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff.

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

Plaintiff, for its complaint herein, alleges:

1. This action arises under Article I, Section 8, Clause 3 (interstate and foreign commerce clause) and Article I, Section 10, Clause 2 (import, export clause) of the Constitution of the United States, and under Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311], and Sections 5521 and 5522 of Title 26 U. S. C., the Internal Revenue Code, as hereinafter more fully appears. This action is for an injunction pursuant to the provisions of Sections 2281 and 2284 of Title 28 U. S. C. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. At all times hereinafter mentioned plaintiff was and still is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at Arrivals Building, New York International Airport, Jamaica, Queens County, New York.

3. The defendant Thomas E. Rohan is the Chairman of the State Liquor Authority, an administrative agency of the State of New York created under Article 2 of the Alcoholic Beverage Control Law of the State of New York, and resides at 158-18 Riverside Drive West, in the Borough of Manhattan, City, County and State of New York, within the Southern District of New York, and has an office for the transaction of business of the Authority at 270 Broadway, in the Borough of Manhattan, City, County and State of New York, within said District. The defendants Martin C. Epstein, William H. Morgan, Grant F. Daniels and Samuel M. Birnbaum are members and commissioners of the said State Liquor Authority.

4. Plaintiff's operations hereinafter described are conducted in the Arrivals Building at New York International Airport at Idlewild in the Borough of Queens, City and State of New York, under an Agreement of Lease dated October 31, 1956, made to it, as lessee, by The Port of New York Authority, as lessor. The lease provides that the premises may be used by the plaintiff, and they are so used, solely for an office in connection with the sale for export to foreign countries by the plaintiff of in-bond wines and liquors.

Plaintiff is using, and is required to use, such premises solely for an office in connection with the receipt of paid orders for export by the plaintiff of United States Customs bonded wines and liquors, which are free of United States and New York State taxes, to foreign countries only and

not for use in the State of New York, or in any other State, Territory or Possession of the United States.

The leased premises have been approved by and are in the custody and under the supervision and control of the United States Bureau of Customs both as regards the initial construction and security of the space and as regards its constant and continuing supervision and the accountability of plaintiff for all wines and liquors exported under Customs Regulations adopted pursuant to the authority of the Tariff Act of 1930 as amended. Such wines and liquors are at all times in the custody of the Bureau and are kept under lock and key in these premises and are entered in and withdrawn from these premises on Bureau of Customs documents and forms and under its supervision and control.

The bonded wines and liquors exported by plaintiff are purchased for such purpose by plaintiff solely from various suppliers while in bond and withdrawn for export only by plaintiff exclusively from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses, where they are located, for rewarehousing at the United States Customs controlled space of the plaintiff in such leased premises under such Customs Regulations. Plaintiff is required to keep, and does keep, full records and receipts on United States Customs approved forms governed by such Regulations for the disposition of each and every bottle withdrawn.

Each bottle is required by Section 5301 of the Internal Revenue Code and by the provisions of Regulations 26, Code of Federal Regulations, Part 201, Section 201.467, adopted thereunder and to which reference is hereby made, to be labeled with an export label "Bottled for export from the U. S. A.", the use of which label for domestic purposes or purposes other than export is rendered illegal by applicable federal laws and regulations.

The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U. S. C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and loading on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even

upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses.

Orders for the purchase of such wines and liquors are received by plaintiff, and paid for at plaintiff's office in the leased premises, from passengers exclusively for export to such passengers departing solely by non-stop planes from the Airport to foreign countries only. The wines and liquors so exported are delivered by plaintiff pursuant to said Customs Regulations under Customs supervision to the airlines only, and not to the purchasers or passengers, on approved documents for foreign export with delivery to the passengers to be made only at the foreign destination of the passengers subject, as aforesaid, to the continuing supervision and control, under said Regulations, of the Bureau of Customs, which certifies that the goods were laden for export.

The operations of the plaintiff are intended and employed for the benefit primarily of Economy Fare passengers of moderate means who constitute the majority of the pasengers departing from the New York International Airport at Idlewild. Plaintiff's average sales consist of one bottle per passenger since most European countries by law permit only one such bottle to be so imported duty-free. Thus a passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most sections of Europe is enabled by plaintiff's operations to have exported and delivered to him abroad a single bottle purchased from plaintiff at a cost of approximately $3.

Such privilege afforded by plaintiff's operations to international travelers (a) encourages foreign travel by nationals of the United States and of all foreign countries

since it is a privilege reciprocal to that granted in foreign countries to passengers bound for the United States who are permitted to purchase a limited quantity of liquor abroad and to import such liquor into the United States free of United States duties and United States and New York taxes, and (b) opens new markets for the export of American liquors and thus assists in stimulating foreign trade therein in accordance with the statutory Congressional economic policy hereinafter set forth.

5. The entire plan of plaintiff's operations and procedures as set forth above in paragraph 4 of this complaint has been approved by the United States Bureau of Customs.

6. The United States Treasury Department, Bureau of Customs, has ruled that these transactions constitute exports to foreign countries of such bonded, tax-free wines and liquors within the meaning of Section 311 of the United States Tariff Act of 1930 as amended [19 U. S. C. §1311]. A copy of that ruling and section is annexed hereto as Exhibit A. The United States Treasury Department, Bureau of Customs, has accordingly declared, pursuant to the authority vested in it by law and regulations, that such transactions constitute exports and are exempted by law from all Federal excise taxes and duties on the wines and liquors exported.

7. Defendants, acting upon an opinion of the Attorney General of the State of New York, dated June 30, 1960 (a copy of which is annexed hereto as Exhibit B), have advised plaintiff that they have determined that plaintiff's operations set forth above in paragraph 4 of this complaint are illegal as in violation of Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the

Alcoholic Beverage Control Law of the State of New York, because the transactions between plaintiff and its suppliers and plaintiff and the purchasers of said bonded, tax-free wines and liquors constitute sales within the State of New York which cannot be made without obtaining appropriate license. The defendants concede, and it is a fact, that the Alcoholic Beverage Control Law makes no provision for licensing operations such as those carried on by the plaintiff. A copy of a letter embodying such determination, dated July 11, 1960, is annexed hereto as Exhibit C. It is further a fact, and the New York State Department of Taxation has ruled, that under the Tax Law of the State of New York, Section 424(f), the State of New York is without power to tax plaintiff's transactions in these tax-free wines and liquors. A copy of the applicable provisions of said section and of such ruling, dated August 2, 1954, is annexed hereto as Exhibit D.

8. Defendants have further determined, and have advised plaintiff of such determination, that Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York (copies of which are annexed as Exhibit E), prohibit and make unlawful and a crime plaintiff's operations aforesaid, including both plaintiff's purchases for export from its suppliers and plaintiff's sales for export. Defendants have further threatened to enforce, and will, unless restrained by this Court, enforce, or endeavor to enforce such determination by restraining or endeavoring to restrain and prohibit plaintiff's operations and by subjecting plaintiff to civil and criminal proceedings to enforce and carry out their determination, all to the great and irreparable damage of the plaintiff.

9. As a result of defendants' acts as aforesaid, the New York Importers and Distillers Association, Inc. has already circularized its many members, consisting of the largest distillers and exporters of bonded liquor in this country, including those from which plaintiff purchases bonded, tax-free wines and liquors for export to foreign countries, advising such members not to fill plaintiff's orders or to sell to the plaintiff bonded, tax-free wines and liquors for such export because of the defendants' determination that plaintiff's operations are in violation of the above-mentioned sections of the Alcoholic Beverage Control Law of the State of New York and that such sales to the plaintiff are not within the scope of wholesalers' licenses under Section 62 of such law.

10. As a result of defendants' acts as aforesaid, plaintiff will, unless defendants are enjoined by this Court, suffer the loss and forfeiture of its valuable lease which is conditioned on the continuance of plaintiff's operations, or the loss of the right of possession thereunder, while remaining liable for the rental under such lease, and will further sustain great and irreparable injury and damage in that it will be compelled to cease its operations, and its business, valued well in excess of $1,000,000, will be destroyed and the plaintiff and its officers will be subjected to fines or criminal penalties pursuant to Section 130 of the Alcoholic Beverage Control Law.

11. Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, in so far as they require plaintiff to obtain a license to carry on the operations set forth in paragraph 4 of this complaint or prohibit or render such operations unlawful or criminal are unconstitutional

and void as repugnant to the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States for the following reasons, among others:

(a) The Tariff Act of 1930, as amended and the Regulations adopted thereunder, taken in conjunction with the provisions of the applicable Internal Revenue Code, including Title 26 U. S. C., Sections 5521 and 5522, together constitute, and have been construed by the Supreme Court and the courts of the State of New York to constitute, a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and exports of, bonded wines and liquors, which are thereby and for that purpose exempted from all taxes and duties, including State taxes, under the powers vested exclusively in Congress under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, and under Article I, Section 10, Clause 2 thereof, which commands that no state shall without consent of Congress lay any imposts or duties on imports or exports, and under Article VI, Clause 2 thereof making the "Constitution and laws of the United States which shall be made in pursuance thereof • • • the supreme law of the land."

Plaintiff's operations fall directly within the scope and purpose of this Congressional economic statutory policy for the development, by means of such tax exemption, of foreign markets for American liquors by enabling them to compete abroad with similar foreign products.

(b) These Regulations and the continuous custody, supervision and control of plaintiff's opera-

tions by the United States Treasury Department, Bureau of Customs, insure that the bonded, tax-free wines and liquors are irrevocably destined for export to foreign countries only and cannot ever be, and are not, diverted to use in the State of New York or elsewhere in the United States, and cannot and do not enter domestic commerce.

(c) Under plaintiff's operations governed by these Regulations of the Treasury Department, Bureau of Customs, as aforesaid, there is an assured continuous and uninterrupted movement of such bonded, tax-free wines and liquors in foreign commerce for export to foreign countries. Upon delivery thereof to the airlines in non-stop transoceanic aircraft such liquors and wines cannot be relanded in the United States or otherwise enter domestic commerce. Such bonded, tax-free wines and liquors are in the actual possession and custody of the United States Government, never have become and never can become a part of the mass of property within the State of New York, and are not legally within the State. The State of New York never has acquired and never can acquire jurisdiction thereof for the purpose of prohibiting their purchase and sale for export and their export and transportation in foreign commerce or of requiring license therefor, or rendering the same unlawful and subject to civil and criminal sanctions. Since the State of New York has no power under the Federal Constitution to tax exports thereof to foreign countries, *a fortiori* it has no power to prohibit them or to render them illegal and criminal, nor any power to prohibit and obstruct foreign commerce therein.

(d) Neither are any of the above powers conferred on the State of New York by the Twenty-First Amendment to the Federal Constitution which provides that "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited" for the reasons, among others, that there has been and can be under plaintiff's said operations no transportation or importation of plaintiff's bonded, tax-free wines and liquors for delivery or use in the State of New York, nor would that State possess, by virtue of such Amendment, the power to prohibit altogether such importation even if such an importation had taken place. Further, Congress by the adoption of the Tariff Act of 1930 and the applicable provisions of the Internal Revenue Code and applicable regulations thereunder, has fully preempted the whole field of such liquor exports, and purchases and sales for export, and their custody, regulation, control and supervision under the Commerce Clause of the Federal Constitution, and any attempt by the State of New York to license, regulate or prohibit plaintiff's transactions in such wines and liquors is in direct conflict with such Federal regulation.

12. The acts of the defendants create an existing dispute between the parties as to plaintiff's present legal rights amounting to a justiciable controversy which plaintiff is entitled to have determined in this action on the merits by a three-judge court under 28 U. S. C., Section 2281, which plaintiff requests be impaneled for the determination of this controversy.

13. Plaintiff is entitled to maintain this action and to obtain the relief therein requested from this Court, and cannot be required to have recourse for such relief to the Courts of the State of New York, even assuming, contrary to the facts, that the latter have jurisdiction to grant such relief and that the State statutes afford plaintiff an adequate remedy in such Courts, for the following reasons:

The Federal rights for which plaintiff asks the protection of this Court in this action are based solely upon the provisions of the Federal Constitution and on the comprehensive, exclusive and preemptive Federal statutory scheme outlined above (with which the State statute and the defendants' acts here are in direct conflict) for the encouragement, protection and regulation of foreign trade in, and export of, tax-free bonded wines and liquors and upon specific paramount considerations of Federal (not State) policy which can only be adequately, properly and fully determined and protected by a Federal Court.

Denial of plaintiff's right of access to this Court would deprive plaintiff of its right to a prompt and expeditious determination of the Federal issues involved. Such denial would subject the plaintiff to the added unnecessary delay and expense of a costly, protracted and futile litigation through all the courts of the State, only to be finally resolved in the end by a decision of the United States Supreme Court.

14. Plaintiff has in fact and in law neither any administrative remedy under the Alcoholic Beverage Control Law of the State of New York nor any adequate remedy in its Courts because Section 121 of that Act (a copy of which is annexed as Exhibit F) not only excludes the defendants' acts above set forth from review by its Courts, but in all cases where any such review is allowed confines the granting of any stay pending such review to a period not exceeding thirty days.

15. Plaintiff has no plain, adequate or complete remedy at law.

WHEREFORE, complainant prays:

A. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 8, Clause 3 of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce with foreign nations.

B. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 10, Clause 2 of the Constitution of the United States which prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports, and as being in violation of Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311] and of the provisions of the applicable Internal Revenue Code.

C. That this Court issue an injunction, both preliminary and permanent, enjoining the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by

invoking or attempting to invoke its civil or criminal sanctions or otherwise.

D. That complainant have such other and further relief in the premises as may be just and proper.

KELLY AND SCHWARTZ
By JOHN F. KELLY
Member of Firm
Office and P. O. Address:
1780 Broadway
New York 19, New York

State of New York, }
County of New York, } ss.:

ARTHUR GILIOTTI, being duly sworn, deposes and says: That he is the President of Idlewild Bon Voyage Liquor Corporation, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Exhibit A Annexed to Complaint

(Ruling of Treasury Department, Bureau of Customs, and Section 311 of Tariff Act of 1930 [19 U. S. C. §1311])

[LETTERHEAD OF]

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
Washington 25

In reply refer to
DB 235
Your file:
FBL:VW:19.15

Dear Mr. Dill:

We refer to your letter of March 10, 1958, concerning the proposal of the Idlewild Bon Voyage Liquor Corporation for the withdrawal of liquor from class 6 bonded manufacturing warehouses for rewarehousing in the company's locker at Idlewild Airport and subsequent sale to foreign-bound airline passengers, free of duty and tax. You state that under the proposed procedure final delivery of the liquor will be made by flight personnel of the plane after departure from the United States.

In a letter dated December 27, 1957, to John F. Kelly, attorney for the Idlewild Bon Voyage Liquor Corporation, the proposal of the applicant was rejected under the theory that delivery of the liquor to the passengers in flight did not meet the requirements of section 311, Tariff Act of 1930, as amended. A copy of this letter was furnished to your office.

Exhibit A Annexed to Complaint

The applicant has now modified its proposal to the extent that the liquor will be delivered to the airline on approved documents for export with delivery to the passenger to be made only at the foreign destination of the passenger.

We believe that delivery of the liquor to the passenger after he has reached his port of debarkation would be an exportation of the merchandise within the meaning of section 311 of the tariff act. Therefore, with the distinct understanding that the liquor will be so delivered, the procedure proposed by the applicant is approved.

Very truly yours,

(Signed) D. B. STRUBINGER
Acting Commissioner of Customs

Hon. Robert W. Dill
Collector of Customs
New York 4, New York

Exhibit A Annexed to Complaint

§1311. Bonded manufacturing warehouses.

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided,* That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further,* That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Exhibit A Annexed to Complaint

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

Exhibit A Annexed to Complaint

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 1351 of Title 26 shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Exhibit A Annexed to Complaint

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further*, That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. (June 17, 1930, c. 497, Title III, §311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, §404, 49 Stat. 1960.)

Exhibit B Annexed to Complaint

(Opinion of Attorney General of the State of New York, Dated June 30, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Albany

Louis J. Lefkowitz
Attorney General

June 30, 1960

State Liquor Authority
270 Broadway
New York, N. Y.
Attention Hyman Amsel, Esq., Counsel

Dear Sirs:

You have by letter of April 22, 1960, supplemented by letter of May 9, 1960, requested my opinion whether the transactions you describe in your request constitute a sale under the Alcoholic Beverage Control Law, and thus require a license from the State Liquor Authority. You further ask what type of license is required, if any.

As set forth in your letter of inquiry, the facts are that Idlewild Bon Voyage Liquor Corporation is a New York corporation and lessee under lease from the New York Port Authority of space 16 feet wide and 30 feet 4 inches in depth on the second floor of the new Arrivals building at New York International Airport, Idlewild. The lessee proposes to use the front portion of the space as an office where orders for liquor will be taken for a

passenger departing by plane from the United States, and where payment will be made therefor. A portion of the leased space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and will remain under bond and under supervision of the Bureau of Customs at all times until delivery to the airplane. The liquor is to be shipped by the lessee from the United States on the plane on which the passenger departs, but is not to be delivered to the passenger until he reaches his foreign destination. Shipment is to be on documents approved for export by the Federal Government. The United States Bureau of Customs has indicated that it treats this transaction as an export within the meaning of §311 of the Tariff Act of 1930.

It is my opinion that under the present provisions of the Alcoholic Beverage Control Law, this transaction constitutes a "sale" or "selling" within the State of New York. The definitions of "sale" and "selling" under this statute are broad and appear to cover the soliciting and receiving of an order, such as is here involved, even though delivery is not made within the State. The provision is as follows (Alcoholic Beverage Control Law §3[28]):

> " 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Exhibit B Annexed to Complaint

The Alcoholic Beverage Control Law (§100[1]) further provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

Accordingly, in my opinion, the transaction involved is a sale or selling, and consequently cannot be conducted without obtaining an appropriate license.

In answer to your query as to the type of license required, seemingly the Alcoholic Beverage Control Law and the rules of the State Liquor Authority do not at present afford any license for this type of transaction.

Obviously this is not a sale for consumption on the premises. Broadly speaking, it is a sale for consumption off the premises. However, the corporation is not eligible for a license for off premises consumption. For one thing, Rule 17 of the Rules of the State Liquor Authority constitutes an order that there shall be no licenses issued within the counties of the city of New York for sale at retail of alcoholic beverages for off premises consumption. But even if the Liquor Authority were to amend this rule at this time for the purpose of licensing this particular operation, the premises physically do not meet the qualification for such a license. Such qualifications are contained in §105(2) of the Alcoholic Beverage Control Law and are as follows:

> "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located *in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for*

Exhibit B Annexed to Complaint

business, trade or industry or on an arcade or subsurface thoroughfare leading to a railroad terminal.'' [Emphasis mine.]

The premises here do not meet the requirements of the above statutory provision which I have underscored.

I conclude that without an amendment to the Alcoholic Beverage Control Law to specifically except this type of transaction from §3(28) of the statute and or to make provision for a special permit for such transactions, the transaction you describe must be construed a "sale" or "selling" and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license.

Very truly yours,

s/ Louis J. Lefkowitz
LOUIS J. LEFKOWITZ
Attorney General

Exhibit C Annexed to Complaint

(Letter of State Liquor Authority, Dated July 11, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
STATE LIQUOR AUTHORITY
270 Broadway
New York 7

July 11, 1960

Kelly & Schwartz, Esqs.
1780 Broadway
New York 19, New York

Re: Idlewild Bon Voyage
Liquor Corporation

Dear Sirs:

This is in reply to your letters to the State Liquor Authority with respect to the proposed operations by the above corporation at the New York International Airport (Idlewild).

The Members of the Authority have determined at their meeting held on July 7, 1960, that the operation by your client is in conflict with the Laws of the State of New York and, therefore, would be illegal.

Enclosed is a copy of the opinion of the Attorney General of the State of New York dated June 30, 1960, to whom this matter was submitted.

Very truly yours,

STATE LIQUOR AUTHORITY

Hyman Amsel
Counsel

HA:cm
Enclosure

Exhibit D Annexed to Complaint

(Letter of New York State Department of Taxation, Dated August 2, 1954 and Section 424(1)(f) of New York State Tax Law)

COPY

STATE OF NEW YORK DEPARTMENT OF TAXATION AND FINANCE
Albany 1, N. Y.

August 2, 1954

TO ALL LIQUOR AND WINE DISTRIBUTORS:

There has been some confusion in the industry concerning the sales of wine and liquor to various airlines where the merchandise is delivered at airports within the State of New York. In order to overcome this confusion, this letter is being addressed so you may know that since January 1, 1954 all sales of wine and liquor to airline companies delivered within the State of New York are subject to the New York State tax except the following:

1. Sales in United States Customs Bond.
2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations.
3. Domestic wines and liquors which will be sold to the airlines under benefit of a drawback of the Federal taxes by the distiller.

Very truly yours,

STATE TAX COMMISSION

By: John J. Purcell
Assistant Director

Exhibit D Annexed to Complaint

Section 424, subdivision 1(f) of the New York State Tax Law reads as follows:

"§424. *Taxes imposed.*—i. There are hereby levied and imposed the following excise taxes:

"(f) One dollar and fifty cents per gallon upon all other liquors, when sold or used within this state by a distributor, * * * except when sold or used under such circumstances that this state is without power to impose such tax * * *."

Exhibit E Annexed to Complaint

(Section 3, Subdivision 28, Section 62 and Section 100, Subdivisions 1 and 2, of Alcoholic Beverage Control Law of the State of New York)

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

• • • • •

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to

Exhibit E Annexed to Complaint

the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall issue a license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L. 1947, c. 132; L. 1951, c. 581, §3, eff. April 6, 1951."

Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."

Exhibit F Annexed to Complaint

(Section 121 of Alcoholic Beverage Control Law of the State of New York)

Section 121 of the Alcoholic Beverage Control Law provides:

"§ 121. *Review by courts*

"The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:

"1. Refusal by the liquor authority to issue a license or a permit.

"2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.

"3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.

"4. The revocation, cancellation or suspension of a license or permit by the liquor authority.

"5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

"6. The transfer by the liquor authority of a license or permit to any other premises, or the fail-

ure or refusal by the liquor authority to approve such a transfer.

"7. The issuance of an order of warning by the liquor authority.

"8. Refusal to approve alteration of premises. As amended L. 1952, c. 428; L. 1954, c. 350; L. 1959, c. 400, eff. April 15, 1959.

"Proceedings to review any action enumerated herein shall be entitled to a preference. As amended L. 1938, c. 329, § 5; L. 1940, c. 648, eff. April 19, 1940."

Application of Plaintiff for Convening of Three-Judge Court

Plaintiff, upon its complaint heretofore filed herein, hereby makes application for hearing of this cause and of the plaintiff's motion for an injunction, both preliminary and permanent, before a three-judge district court as required by Section 2281, Title 28 of the United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to Section 2284, Title 28 of the United States Code, of the presentation of plaintiff's application for an injunction in order that the necessary designation of judges for said court may be made.

KELLY AND SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

Order to Show Cause for Three-Judge Court and Preliminary Injunction, Dated July 22, 1960

Upon the annexed affidavit of Arthur Giliotti, verified the 22nd day of July, 1960, upon the complaint herein and the exhibits annexed thereto and upon all the proceedings heretofore had herein, and it appearing to the Court that the actions threatened to be taken by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and laws of the United States, and if permitted by the defendants in accordance with their threats so to do would result in irreparable injury to the plaintiff,

Let the defendants and each of them show cause before a three-judge District Court to be convened pursuant to 28 U. S. C. §2284, at Room 506, United States Court House, Foley Square, New York, New York, at 10:00 o'clock A.M. on the 26th day of July, 1960, or as soon thereafter as counsel can be heard, why an order should not be entered in accordance with the prayer of the complaint for a preliminary injunction restraining the defendants and each of them, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, Subdivision 28, and Section 62, and Section 100, Subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions, or otherwise; and it is

Order to Show Cause for Three-Judge Court and Preliminary Injunction

FURTHER ORDERED, that personal service of this order and the papers upon which it is based upon the defendants and each of them on or before the 23rd day of July, 1960 at 6:00 P.M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., July 22, 1960.

THOMAS F. MURPHY
U. S. D. J.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order, Dated July 22, 1960

State of New York, }
County of New York, } ss.:

ARTHUR GILIOTTI, being duly sworn, deposes and says:

1. I am the president of Idlewild Bon Voyage Liquor Corporation, the plaintiff in this action.

2. This is an action for an injunction under 28 U. S. C. §§2281 and 2284 to enjoin the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said Law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise. Injunction is sought on the ground that the State Law violates the provisions of the Federal Consitution and Federal statutes referred to in the complaint. All of the allegations of fact contained in the complaint herein have been read by me and are true of my own knowledge and are incorporated herein by reference thereto.

3. Plaintiff is a New York corporation which occupies, under a lease from the Port of New York Authority dated October 31, 1956, certain space in the Arrivals Building at New York International Airport at Idlewild. The entire space is 16 feet wide and 30 feet, 4 inches in depth. The front portion of the space is used by plaintiff as an office

where orders are received for the sale by plaintiff for export of bonded wines and liquors, free of United States and New York State taxes. The rear portion of the premises is used for storage of United States Customs bonded liquor for export. The entire space is under the supervision and control of the United States Bureau of Customs both as to its construction and security and as to accountability for liquor exported.

4. The bonded wines and liquors are purchased by plaintiff from various suppliers, and withdrawn by it from Class 6 Government bonded manufacturing warehouses and United States Customs bonded warehouses for rewarehousing at the Customs controlled and supervised space of the plaintiff in the Arrivals Building from where it is exported. The plaintiff keeps records and receipts on Customs-approved forms for the disposition of each and every bottle withdrawn from Government bond.

5. Orders for the purchase of the bonded, tax-free wines and liquors are received by plaintiff at its office in the Arrivals Building from passengers departing on non-stop planes for foreign countries only, and payment therefor is made at said office. The goods are not delivered by plaintiff to the passengers, but to the airlines, on approved documents for foreign export, with delivery to the passengers to be made only at their foreign destination. The Bureau of Customs certifies that the goods are laden for export.

6. The bonded, tax-free wines and liquors, from the time they are withdrawn from these bonded warehouses to the time they are loaded on the carrier, remain in the continuous custody and under the continuous supervision of the Bureau of Customs.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

7. The operations of the plaintiff are intended primarily for the benefit of Economy Fare passengers who constitute the majority of passengers departing from New York International Airport at Idlewild. The average sale consists of one bottle. A passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most nations in Europe is enabled to bring into those nations his single bottle purchased from plaintiff at a cost of approximately $3. Most European countries limit to one bottle the amount of tax-free liquor a traveler may bring into the country.

8. The privilege of purchase thus afforded to passengers departing for foreign countries is a reciprocal privilege to that granted in such countries to passengers bound for the United States. The latter are generally permitted to purchase a limited amount of liquor free of United States duty, and free of United States and New York State tax, which they may bring into this country with them. The privilege afforded international travelers by the corporation not only tends to encourage foreign travel but the exports themselves open up a new market for American liquors. The operation of the plaintiff is a strong stimulant of foreign trade.

9. On April 15, 1958, the Treasury Department, Bureau of Customs, in a letter to the Honorable Robert W. Dill, Collector of Customs at the Port of New York, ruled that the transactions between plaintiff and passengers on foreign-bound airlines constitute exportations to the countries of destination of bonded, tax-free wines and liquors within the meaning of Section 311 of the Tariff Act of 1930, as amended, and the operations of the plaintiff in this respect were approved. (A copy of said letter is annexed to the complaint herein as Exhibit A.)

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

10. By letter dated July 11, 1960, the New York State Liquor Authority notified Messrs. Kelly and Schwartz, attorneys for the plaintiff corporation, that its members had determined that plaintiff's operation was "in conflict with the Laws of the State of New York and, therefore, would be illegal." This conclusion was based upon an opinion of the Attorney General of the State of New York, attached to said letter, wherein it was stated that plaintiff's operations constitute a sale or selling of liquor within the state which is illegal and that no provision is made in the Act for the licensing thereof, citing Section 3, subdivision 28, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law. (Copies of said opinion and letter are annexed to the complaint herein as Exhibits B and C.)

11. This determination of the State Liquor Authority is in direct conflict with a ruling of the Department of Taxation and Finance of the State of New York issued "To all Liquor and Wine Distributors" on August 2, 1954, which clarified confusion in the industry concerning sales of wine and liquor to airlines. It was stated that all such sales were subject to New York State tax except, so far as pertinent here, the following:

"1. Sales in United States Customs Bond.

"2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations."

(A copy of said ruling is annexed to the complaint herein as Exhibit D.)

12. On the basis of its determination that plaintiff is violating the Alcoholic Beverage Control Law, defendants

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

have threatened to enforce and will enforce, unless restrained by this Court, the provisions of the said law against plaintiff to its great, immediate and irreparable damage, by restraining or endeavoring to restrain plaintiff in the conduct of its business, by prohibiting or endeavoring to prohibit completely the operations of the plaintiff, and by subjecting plaintiff to civil and criminal proceedings for the alleged violation of the said provisions of the law.

13. One accomplished result of the defendants' acts, to the injury of the plaintiff, has been a circularization of its members by the New York Importers and Distillers Association, Inc., including members who supply plaintiff with bonded, tax-free wines and liquors for export, advising them not to fill plaintiff's orders and not to otherwise sell such goods to plaintiff because of defendants' determination that plaintiff is violating the Alcoholic Beverage Control Law.

14. Unless the threatened acts of defendants are enjoined, plaintiff will sustain the loss and forfeiture of its valuable lease with the Port of New York Authority because the life of the lease is conditioned upon the continuance of plaintiff's operations.

15. Unless defendants' threatened acts are enjoined, plaintiff will be forced to close down and discontinue its operations, as a consequence of which plaintiff's business, valued in excess of $1,000,000, will be completely destroyed.

16. Unless defendants' threatened acts are enjoined, plaintiff will be forced to file a petition in bankruptcy by reason of the fact that the sales of bonded, tax-free wines

and liquors for export constitute the sole business of the plaintiff.

17. Unless defendants' threatened acts are enjoined, the plaintiff and its officers are liable to be subjected to fines or criminal penalties provided for by Section 130 of the Alcoholic Beverage Control Law by reason of defendants' claim that plaintiff is violating the provisions of that law.

18. I am advised by counsel that the plaintiff has neither any administrative remedy under the Alcoholic Beverage Control Law nor any adequate remedy in the courts of the State of New York for the reason that Section 121 of said law expressly limits a stay pending review to a period of not to exceed thirty days. (A copy of Section 121 is annexed to the complaint as Exhibit F.) Such a limited stay would work to the irreparable injury of the plaintiff, whereas the delay occasioned by a preliminary injunction granted by this court would in no way injure the defendants because the bonded wines and liquors in the warehouse on plaintiff's premises, and in the custody and under the supervision of the Customs Bureau, cannot under any circumstances be removed from said warehouse and diverted to use within the State of New York or within the United States for consumption or otherwise. Therefore, there is no question of plaintiff's operations interfering with the policy of the Alcoholic Beverage Control Law, stated in Section 2 thereof to be the promotion and fostering of temperance in the consumption of alcoholic beverages, nor do plaintiff's operations come into collision with the reason for the law, namely "the protection, health, welfare and safety of the people of the state."

19. The whole matter of the nature and character of plaintiff's operations as hereinbefore described and the

basis of their exemption from state regulations and control have been fully presented to the defendants, and plaintiff's position has been documented in correspondence with the defendants, despite which they persist in their threats to enforce their determination that plaintiff is violating the Alcoholic Beverage Control Law and to restrain or endeavor to restrain and prohibit plaintiff's operations and the continuance of its business.

20. No previous application has been made for the relief herein requested.

WHEREFORE, plaintiff prays (1) that a preliminary injunction issue enjoining the defendants, and each of them, from enforcing or attempting to enforce against plaintiff and from putting or attempting to put into execution as against plaintiff Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law, and all other provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise, and (2) that, pending the hearing and determination of the motion for a preliminary injunction, a temporary restraining order issue restraining the defendants, and each of them, as aforesaid.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Notice of Motion of Defendants to Dismiss Complaint, Dated July 25, 1960

Sirs:

Please Take Notice that the undersigned will move this Court, at a stated term for motions to be held in Room 506 of the United States Court House, Foley Square, City of New York, on the 26th day of July, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that it fails to state a claim against the defendants upon which relief can be granted because:

(1) It presents no actual controversy;

(2) It fails to state a cause of action;

(3) It fails to present any real or substantial Federal question;

(4) The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts; and

(5) Alcoholic Beverage Control Law §3, subd. 28, §62 and §100, subds. 1 and 2, and related sections, are not unconstitutional.

The undersigned will further move, pursuant to said Rule 12, for an order dismissing the complaint on the ground that the Court lacks jurisdiction over the subject matter, because the complaint fails to show that plaintiff has been deprived of any right secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

PLEASE TAKE FURTHER NOTICE that the undersigned will at the same time and place move for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, N. Y., July 25, 1960.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
80 Centre Street
New York 13, New York

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff
1780 Broadway
New York 19, New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, Dated August 1, 1960

State of New York, }
County of New York, } ss.:

THOMAS E. ROHAN, being duly sworn, says that he is the Chairman of the State Liquor Authority of the State of New York and one of the defendants above-named, and that he is familiar with the facts and circumstances hereinafter set forth.

Plaintiff has brought this action allegedly under 28 U. S. C. §§2281 and 2284 to enjoin the defendants from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise.

In connection with this action, plaintiff moves herein for an order granting to it a preliminary injunction restraining the defendants as hereinabove indicated. Simultaneously with defendants' opposition to the within motion, they will move this Court upon notice already given for an order dismissing the plaintiff's complaint upon the grounds set forth in the notice of motion.

It is respectfully submitted that this motion should be denied as a matter of law and within the sound discretion of this Court.

As early as May 6, 1958, plaintiff sought to obtain the State Liquor Authority's opinion as to the legality of its (plaintiff's) proposed operation in the sale of alcoholic beverages on premises leased by it at the New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

International Airport (Idlewild) located in the County of Queens, State of New York. After many conferences and study, the Authority advised the plaintiff that its proposed operation would not be legal under the provisions of the Alcoholic Beverage Control Law of the State of New York.

Thereafter, on February 19, 1959, plaintiff again submitted a proposed plan of operation with a slight modification of its original submission.

Thereafter, on May 8, 1959, after full consideration by the Members of the Authority, plaintiff was advised that its proposed operation could not be legally conducted in New York State.

On May 19, 1959, plaintiff sought reconsideration by the Authority of its former decisions. Further consideration of plaintiff's proposed business operations was denied on July 7, 1959.

Apparently plaintiff did not enter upon its proposed business. This is indicated by the letter from plaintiff's counsel to the Authority dated February 10, 1960. In this letter, plaintiff stated that "[I]nasmuch as no consent to the proposed operation has been obtained from your Authority, the space has been vacant to the present time." Also, plaintiff stated that the Port of New York Authority had advised it that unless it commenced actual operations, it would be obliged to give its consent to similar operations by another concern. Asserting that if such a situation developed, an injustice would be suffered by it, plaintiff asked for reconsideration of its original application of May 6, 1958. Plaintiff's request for reconsideration was submitted by its letter of March 24, 1960, in which it requested a ruling from the Authority that under the law set forth by the plaintiff that the proposed operations were not subject to the jurisdiction or the control of the

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

New York State Liquor Authority. This request, of course, was in direct contradiction with the Authority's previous determination that plaintiff's proposed operation would constitute the sale of alcoholic beverages as defined by Section 3, subdivision 28, of the Alcoholic Beverage Control Law, and that Section 100, subdivision 1, of the Alcoholic Beverage Control Law prohibits such trafficking in alcoholic beverages without a license. It was also the Authority's determination that the Alcoholic Beverage Control Law makes no provision for a license or permit which would authorize the plaintiff to engage in the sale of alcoholic beverages in the State of New York in the particular manner outlined by it.

Under the circumstances, the Authority requested the Attorney General of the State of New York to render a formal opinion upon the legality of the plaintiff's proposed manner of trafficking in alcoholic beverages.

On June 30, 1960, the Attorney General of the State of New York rendered his opinion that the "transactions you describe must be construed a 'sale' or 'selling' and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license." The complete opinion rendered by the Attorney General is annexed to the complaint as Exhibit "B" and, therefore, is not set forth in full herein.

On July 11, 1960, in reply to plaintiff's letters with respect to its proposed operation, counsel for plaintiff was advised that the Authority had determined that the operation so outlined was in conflict with the laws of the State of New York and that, therefore, it would be illegal. A copy of the opinion of the Attorney General of the State

of New York dated June 30, 1960, hereinabove referred to, was enclosed. This action then followed. (Sometime subsequent to its letter of February 10, 1960, and in spite of the Authority's ruling as to its illegality, plaintiff evidently entered upon and commenced its operation.)

It is apparent from the foregoing that the opinion rendered by the Authority was in direct response to, and resulted from, a request made therefor by the plaintiff. Under these circumstances, it is respectfully submitted plaintiff is not entitled to and should not receive at the hands of this Court a relief in the form of a permanent or temporary injunction restraining the Authority from having responded to an inquiry made to it by the plaintiff.

It is further submitted, as will be more fully explored in the memorandum of law to be submitted herewith, that the plaintiff's remedy is to apply to the Court of the State of New York for a determination with respect to the applicability of the provisions of the Alcoholic Beverage Control Law to the operations *now* being carried on by the plaintiff.

Important in the consideration of plaintiff's operation, in the light of the provisions of the Alcoholic Beverage Control Law, it is significant to note that plaintiff purchases its liquor from suppliers who maintain such liquor in bonded warehouses known as Class 6 Warehouses (export). Upon the purchase being culminated, these suppliers cause the liquor to be delivered to the plaintiff's premises at Idlewild Airport, where plaintiff displays it and stores it. Plaintiff, of course, is not under bond, but claims that the Customs officials maintain a control over its stock. As plaintiff's purchases are made of bonded liquor, no Federal or State tax is included in the cost to it.

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

Plaintiff sells its liquor either to passengers about to depart by airplane or to others on their behalf. Orders for such liquor are accepted on plaintiff's premises and payment therefor received then. It is claimed, however, that delivery of the liquor so purchased at plaintiff's premises is not made to the departing passenger until the plane lands on foreign soil. Likewise, no tax is added to the retail sales price and, consequently, the price of the liquor sold is considerably less than the price of such liquor if purchased in a licensed retail liquor store.

These facts justify the conclusion that the plaintiff's operation amounts to trafficking in alcoholic beverages in the State of New York. Such traffic now being conducted is illegal because (1) under the Alcoholic Beverage Control Law no person or corporation may engage in the traffic of alcoholic beverages in the State of New York without obtaining an appropriate license therefor, and (2) the Legislature of the State of New York has seen fit not to provide an appropriate license to cover such traffic.

It is, therefore, respectfully submitted that plaintiff is not entitled to the relief requested herein, nor to any relief, and that this motion should be denied in all respects.

/s/ Thomas E. Rohan

Sworn to before me this
1st day of August, 1960.

Madeline G. Lee
Notary Public, State of New York
No. 03-7470350
Qualified in Bronx County
Commission Expires March 30, 1962

Opinion and Order of Judge Bicks, Dated November 4, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

BICKS, District Judge.

Plaintiff, a New York corporation, conducts business from premises it occupies at the New York International Airport, County of Queens, pursuant to a lease by the terms of which the demised premises may be used only as an office for the receipt of orders for export of United States customs bonded wines and liquors. The defendants constitute the NEW YORK STATE LIQUOR AUTHORITY, an administrative agency created under Article 2 of the Alcoholic Beverage Control Law of the State of New York.

Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.

The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled "Bottled for export from the U. S. A." Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §5301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act.

Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law;[1] that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100(1)[2] of the State Law no person is permitted to sell any alcoholic beverage within the state without a license. The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage.

Plaintiff urges that §3(28), §62 and §100(1) and (2) of the New York State Alcoholic Beverage Control Law,

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(1) Sec. 3(28) provides as follows:

"'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

(2) Sec. 100(1) provides:

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

as sought to be applied to it are repugnant to (i) the commerce clause, (ii) the clause prohibiting a state from laying imposts or duties on imports or exports without the consent of Congress, and (iii) the supremacy clause of the constitution and therefore unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

Plaintiff seeks declaratory and injunctive relief and has moved for the impanelling of a three-judge district court pursuant to 28 U. S. C. A. §§2281, 2284.

The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts. In a series of cases beginning with *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U. S. 496, the Supreme Court has set out the procedure for resolving constitutional issues which are reasonably open to construction. "* * * [N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n* v. *Pullman Co., supra; Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 327 U. S. 582; *Shipman* v. *Du Pre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy 323 U. S. 101; *American Federation of Labor* v. *Watson*,

of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago* v. *Fieldcrest Dairies, Inc., supra*, at 172-173." *Harrison* v. *N. A. A. C. P.*, 1959, 360 U. S. 167, 176-177. "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. * * *" *Martin* v. *Creasy*, 1959, 360 U. S. 219, 224.

The controversy between IDLEWILD and the LIQUOR AUTHORITY comes to the court in precisely the tentative and hypothetical posture with which *Pullman* and its progeny are concerned. The State Attorney General rendered an opinion and acting upon that opinion the LIQUOR AUTHORITY advised plaintiff that its operation is "illegal". Neither the Attorney General's opinion nor the action of the LIQUOR AUTHORITY has been reviewed in the State Courts.

State court interpretation of state policies is especially desirable where the statute in question "provides a unified method for the formation of policy and determination of cases by the [state administrative body] * * * and by the state courts." *Burford* v. *Sun Oil Co.*, 1943, 319 U. S. 315, 333, 334.

The Alcoholic Beverage Control Law provides a comprehensive and unified scheme for the regulation and control of the sale and distribution of liquor through the State Liquor Authority. The Authority has broad discretionary powers to license the sale of liquor at wholesale and retail, to limit, revoke or suspend outstanding licenses, to specify standards of manufacture and fermentation, to hold hearings and subpoena witnesses, and to promulgate rules and regulations to promote the foregoing functions. Alcoholic Beverage Control Law, §17, *John J. King, Inc.* v. *O'Connell*, 1952, 280 App. Div. 852;

Application of Gambino, 1957, 4 A. D. 2d 37; *Berkowitz* v. *Rohan*, 1959, 193 N. Y. S. 2d 345.

In *Burford*, *supra*, where the validity of Texas oil drilling permits was attacked in the federal court, the Supreme Court, characterizing the Texas statutes under which the permits were granted as "part of the general regulatory system devised for the conservation of oil and gas", 319 U. S. at 318, indicated that "question[s] of regulation of the industry by the state administrative agency * * * so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U. S. at 332.

"[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination * * *. In this situation, a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission* v. *Pullman Co.*, *supra*, at 499-500. In the light of the circumstances of this case §§3(28), 62 and 100(1) and (2) may be construed by the state courts to avoid or transform the issues raised herein. See, e.g., *During* v. *Valente*, 267 App. Div. 383.

Martin v. *Creasy*, 1959, *supra*, teaches that irreparable injury, vel non, the District Court should not adjudicate a constitutional issue presented in a hypothetical posture. In that case, plaintiffs sought immediate relief from alleged irreparable injury as the result of the operation of Pennsylvania's limited access highway statute. Impressed by allegations of immediate irreparable harm similar to those urged by plaintiff on this motion, the District Court was persuaded that refusal to exercise jurisdiction would cause plaintiffs to "suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never

be recouped if the statute were eventually declared to be unconstitutional." *Creasy* v. *Stevens*, D.C. W.D. Penna., 1958, 160 F. Supp. 404, 409, *reversed*, *Martin* v. *Creasy*, *supra*. The Supreme Court held, "[a]ssuming that there was a basis to support intervention by a court of equity, the District Court should nevertheless have declined to adjudicate this controversy." *Martin* v. *Creasy*, *supra*, at 224.

Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. *Snyder's Drug Stores* v. *Taylor*, 8th Cir., 1955, 227 F. 2d 162; *Island Steamship Lines, Inc.* v. *Glennon*, D.C. Mass., 1959, 178 F. Supp. 292, 295, 296; *Linehan* v. *Waterfront Commission of New York Harbor*, D.C. S.D.N.Y., 1953, 116 F. Supp. 401.

Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled.

So ordered.

Dated: November 4, 1960.

Alexander Bicks
United States District Judge.

Notice of Appeal, Dated November 16, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Alexander Bicks, entered herein on November 4, 1960, refusing plaintiff's application for a temporary restraining order and a preliminary injunction, denying plaintiff's motion for the impanelling of a three-judge court, and staying further procedure in the action.

Dated: New York, New York, November 16, 1960.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

To:

HON. LOUIS J. LEFKOWITZ, Attorney General
Attorney for Defendants
Office and P. O. Address:
80 Centre Street
New York 13, N. Y.

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Upon the annexed affidavit of Charles H. Tuttle, verified the 25th day of November, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings, and upon all the proceedings heretofore had herein,

And it appearing to the Court that (1) there is grave doubt under the Constitution and Laws of the United States and the aforesaid decision and order of Judge Bicks as to the legality of a certain subpoena, dated November 22, and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively; (2) the plaintiff will be irreparably injured if it is required to comply with the aforesaid subpoena on the return date thereof; and (3) there will be no opportunity to determine the validity of the aforesaid subpoena prior to its return date unless a temporary restraining order is issued,

LET the defendants and each of them show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, New York, on the 29th day of November, 1960 at 10:00 A. M., or as soon thereafter as counsel can be heard why the aforesaid subpoena should not be quashed; and it is

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in con-

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

cert with them, are hereby enjoined and restrained from taking any action pursuant to the aforesaid subpoena until the 5th day of December, 1960, or until the earlier determination of this application; and it is

FURTHER ORDERED that personal service of this order to show cause and the papers on which it is based upon the attorney for the defendants on or before the 28th day of November, 1960 at 11:00 A. M. shall constitute a sufficient service of this Order to Show Cause.

Dated: New York, N. Y.
5:45 PM November 25th, 1960.

Lloyd F. MacMahon
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York,)
County of New York,) ss.:

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application, by order to show cause, to quash the subpoena (Exhibit A, hereto) dated November 22 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are Chairman, Members and Commissioners.

2. The plaintiff seeks an opportunity to appeal Judge Bicks' decision refusing its application for the impanelling of a three-judge court and for a temporary restraining order and a preliminary injunction restraining the defendants from asserting jurisdiction over, and destroying thereby, the plaintiff's business in violation of the plaintiff's asserted constitutional rights.

3. The subpoena issued by the State Liquor Authority after the plaintiff's appeal was taken is a manifest attempt to thwart the decision of Judge Bicks; to render futile the plaintiff's right of appeal, and to assert an

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

unlawful jurisdiction over the plaintiff and its business which the defendants themselves expressly disclaimed before Judge Bicks.

Nature of the Case

4. This is an action for a declaratory judgment and injunction against the Chairman, Members and Commissioners of the New York State Liquor Authority pursuant to Chapters 151 and 155 of the Judicial Code, 28 U. S. C. §§2201-2 and 2281-4, respectively.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor solely for export at premises leased from the Port of New York Authority, a bi-state agency, at New York International Airport ("Idlewild").

6. Judge Bicks, in his decision and order dated November 4, 1960 (Exhibit B, hereto) has accurately stated the nature of the plaintiff's business, as follows:

> "Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.
>
> "The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for warehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to

the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled 'Bottled for export from the U. S. A.' Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §3301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

"Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act."

7. The New York State Tax Commission has also ruled that such sales are not subject to New York State tax (Complaint, Exhibit D).

8. Out of an abundance of caution, as Judge Bicks found:

"Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business

> in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law; that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100 of the State Law no person is permitted to sell any alcoholic beverage within the state without a license."

Thereafter, the State Liquor Authority determined, and so advised the plaintiff's counsel (Complaint, Exhibit C), that the plaintiff's business

> "• • • is in conflict with the Laws of the State of New York and, therefore, would be illegal."

9. This opinion of the New York Attorney General and determination by the State Liquor Authority, was contrary to the rulings of the U. S. Treasury Department, Bureau of Customs and the New York State Tax Commission—to say nothing of the federal Constitutional and statutory provisions on which they rest.

10. Its practical effect was to drive the plaintiff out of business. As Judge Bicks also found:

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not

legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

Hence, the plaintiff is threatened with immediate, irreparable injury.

The Institution of this Action

11. This action was accordingly instituted on July 22, 1960. The complaint alleges that the provisions of the New York State Alcoholic Beverage Control Law, as applied to the plaintiff, are unconstitutional under (i) the Commerce clause, (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress, and (iii) the Supremacy clause of the Constitution of the United States.

12. The complaint further alleges that the Tariff Act of 1930, as amended, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521, 5522, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

13. The plaintiff insists that the State of New York may not trespass on this exclusively Federal sphere.

14. Accordingly, a motion for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281-4 and an application, by order to show cause, for a temporary injunction were filed and served simultaneously with the complaint.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

The Defendants' Position

15. The defendants assert, as already noted, that the plaintiff's business consists of "sales" of liquor in New York; but since the New York Alcoholic Beverage Control Law does not expressly provide for a license for such sales for export, the defendants claim the plaintiff's business is forbidden and illegal under that State Law.

16. The defendants appeared by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the ground, among others, that:

> "It presents no actual controversy;
>
> • • •
>
> "The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts."

17. In connection with their assertion that this case "presents no actual controversy," the defendants' supporting brief (pp. 9-10) asserted:

> "*Since the plaintiff is a non-licensee there is no real action the State Liquor Authority can take against the plaintiff.*"

18. As for their contention that the plaintiff has an adequate remedy in the State courts, the defendants' brief (p. 10) pointed to Section 121 of the Alcoholic Beverage Control Law as affording a possible remedy, but in the same breath asserted that the statute was inapplicable. To quote the defendants:

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

> "The plaintiff has an adequate remedy in the State Courts. Section 121 of the Alcoholic Beverage Control Law, hereinbefore quoted, provides that the issuance of any order of warning of the Liquor Authority may be reviewed in the State Supreme Court. By no stretch of the imagination, however, can the above-mentioned notice given the plaintiff, be construed as an order of warning. Even if it were so construed, there is no power of its own with which the Authority could back up such order of warning."

Moreover, Section 121 plainly does *not* afford an adequate remedy, as Judge Rayfiel held in *Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165, for it permits a stay *for thirty days only*, and the period cannot be extended. (*Matter of Yacht Club* v. *Bruchman*, 276 N. Y. 44.)

Judge Bicks' Decision and the Plaintiff's Appeal

19. In his decision of November 4, 1960, Judge Bicks formulated "the threshold issue" to be:

> "* * * whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts."

20. Judge Bicks resolved this question adversely to the plaintiff, holding:

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insuffi-

cient basis to support intervention by a federal court of equity. (Citing cases)

"Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

21. The plaintiff promptly appealed to the Court of Appeals from Judge Bicks' decision by notice of appeal (Exhibit C, hereto) which was served by the plaintiff on November 17, 1960, filed on November 18, 1960, and reserved by the Clerk on November 23, 1960. The record has been docketed in the Court of Appeals and is in the hands of the printer.

The State Liquor Authority Precipitately Served This Subpoena, Contrary to the Defendants' Representations Before Judge Bicks, In A Manifest Effort To Prejudice The Plaintiff's Efforts to Pursue Its Legal Remedies In the Courts

22. Five days *after* the plaintiff's notice of appeal had been served on the defendants' attorney on November 17, 1960, this subpoena *duces tecum* was issued and served on the plaintiff by the State Liquor Authority under date of November 22, 1960.

23. The subpoena is returnable November 29, 1960 and commands the plaintiff to appear and "give evidence relating to the business being conducted" by it "*under the license to sell alcoholic beverages issued by the State Liquor Authority.*"

24. The defendants' whole position, however, predicates that *the plaintiff does not have, and cannot be issued, any such license.*

25. The State Liquor Authority expressly rested its determination that the plaintiff's business "is in conflict with the Laws of the State of New York" and "illegal" on the opinion of the New York State Attorney-General, who represents the defendants here, that

"* * * the Alcoholic Beverage Control Law and rules of the State Liquor Authority do not at present afford any license for this type of action."

26. In successfully persuading Judge Bicks to refuse the plaintiff's applications for a three-judge court and for temporary injunctive relief, the defendants, through the New York State Attorney-General, expressly represented in their brief (pp. 9-10), "*Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff.*" Their motion and supporting brief before Judge Bicks emphasized and re-emphasized their contention that "The plaintiff has an adequate remedy in the State *Courts.*"

27. Having induced Judge Bicks to refuse the relief requested by the plaintiff with these representations, however, the State Liquor Authority now attempts by this subpoena to reverse its field, and to precipitate the plaintiff before itself as prosecutor, judge and jury to pass on its own attack upon the plaintiff's asserted federal constitutional rights.

28. This *volte face* can have but one purpose, I submit: to frustrate the plaintiff's appeal, already taken to review Judge Bicks' decision and order, and to prejudice the plaintiff's attempt to secure redress of its rights in the Courts,—even in the State Courts to which Judge Bicks'

Supplemental Affidavit of John F. Kelly in Support of Plaintiff's Motion, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

JOHN F. KELLY, being duly sworn, deposes and says:

I am counsel for the plaintiff.

On December 5th, 1960, I called the office of Overland Motor Freight Co. Inc., at 459 West 19th Street, New York City, New York, and spoke to Mr. William Hinchy, the dispatcher for the said company, and inquired as to a shipment of Customs Bonded Liquor destined for Idlewild Bon Voyage Liquor Corp.

Mr. Hinchy advised that two representatives of the New York State Liquor Authority, Mr. William Heelan and Mr. Harry Newman, had visited his office and had identified themselves as representatives of the New York State Liquor Authority, and had given their telephone number as BA 7-1616, Extensions 7118 and 7215, which is the telephone number of the New York State Liquor Authority.

Mr. Hinchy stated that the said representatives of the New York State Liquor Authority advised him that Idlewild Bon Voyage Liquor Corp., is an unlicensed liquor dealer and therefore he would not make any deliveries to it.

Mr. Hinchy advised deponent that his company is a bonded interstate carrier and is authorized to carry Customs Bonded Merchandise but it does not have a license from the New York State Liquor Authority.

Mr. Hinchy stated further that even though his company had no license from the New York State Liquor Authority, it would not make a delivery where any Federal, State or City agency said that such delivery would be unlawful.

Mr. Hinchy said "We may be looking for a liquor license from the State of New York next week or next month or next year, and then where would this company be if we went and made a delivery to Bon Voyage Liquor Corp., after they had told us not to do so."

Mr. Hinchy further stated that the said representatives of the New York State Liquor Authority had informed him that they were visiting various trucking concerns on this matter and that they had been to three other carriers before coming to him.

(Sworn to by John F. Kelly December 5, 1960.)

decision and order consigned the plaintiff at the defendants' behest.

29. The plaintiff, in short, is the proverbial "little fellow", caught in the gears between the machinery of the Federal and State Governments. The defendants should not, I submit, be permitted to put that machinery precipitately into motion while the plaintiff is attempting to extricate itself in accordance with its lawful rights.

30. I respectfully request, therefore, that this subpoena be quashed, so that the plaintiff may pursue its lawful rights and remedies in due course.

31. No previous application for this relief has been made.

(Sworn to by Charles H. Tuttle on November 25, 1960.)

Exhibit A Annexed to Tuttle Affidavit

(Subpoena Duces Tecum)

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Re: Serial No. .....

THE PEOPLE OF THE STATE OF NEW YORK

To:

Idlewild Bon Voyage Liquor Corp.,
New Arrivals Building,
N. Y. Internatl. Airport, Idlewild, NY.

Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear and attend before the State Liquor Authority of the State of New York, on the 29th day of November, 1960, at 10:00 o'clock in the forenoon of that day or any adjourned date thereof, at 270 Broadway, New York, N. Y. Room 414, to testify and give evidence relating to the business being conducted by Idlewild Bon Voyage Liquor Corp., New York International Airport, at premises located at New York International Airport, N. Y. under the license to sell alcoholic beverages issued by the State Liquor Authority.

AND THAT YOU BRING WITH YOU and then and there produce the following books and papers: all records of

purchases and sales of alcoholic beverages from inception of Business to date.

AND, FOR FAILURE TO ATTEND, you will be liable to pay all loss and damage sustained thereby, and Fifty Dollars in addition thereto, and be subject to such other penalties as are prescribed by law.

WITNESS: THE STATE LIQUOR AUTHORITY OF THE STATE OF NEW YORK, the 22nd day of November One Thousand Nine Hundred and Sixty.

WALTER C. SCHMIDT
Deputy Commissioner

Exhibit B Annexed to Tuttle Affidavit

(Opinion and Order of Judge Bicks, Dated November 4, 1960)

(Printed herein at pages 49a to 55a.)

Exhibit C Annexed to Tuttle Affidavit

(Notice of Appeal, Dated November 16, 1960)

(Printed herein at page 56a.)

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Charles H. Tuttle, verified December 1, 1960; the annexed affidavit of John F. Kelly, verified December 1, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings and all the proceedings heretofore had herein, the plaintiff will move this Court at Room 506, United States Court House, Foley Square, New York, N. Y., on the 6th day of December, 1960, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing together with and supplementary to the plaintiff's application, by Order to Show Cause issued November 25, 1960, by the Honorable Lloyd F. MacMahon, for an order quashing a certain subpoena dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority, of which the defendants are the Chairman, Members and Commissioners, respectively.

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

PLEASE TAKE FURTHER NOTICE that the plaintiff will apply for, and will renew its application for, the empaneling of a three-judge court, pursuant to 28 U. S. C. §§2281-2284, to determine this supplemental motion and the aforesaid application if and to the extent that such a three-judge court may be required by law.

PLEASE TAKE FURTHER NOTICE that the plaintiff will move for such other and further relief as may be just.

Dated: New York, N. Y., December 1, 1960.

Yours, etc.

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, says: I am counsel for the plaintiff.

Nature of this Supplemental Motion

1. I make this affidavit in support of the plaintiff's supplemental motion to enjoin and restrain the defendants, being the Chairman, Members and Commissioners, respectively, of the New York State Liquor Authority, from hindering, affecting or in any way interfering with the plaintiff or its business during the pendency of this action.

2. This motion is returnable simultaneously with the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, for an order quashing a subpoena, dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority of which the defendants, as already noted, are the Chairman, Members and Commissioners, respectively.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

History of this Action

3. As stated in my affidavit in support of the aforesaid order to show cause, the plaintiff sells liquor solely for export at premises leased from the New York Port Authority at Idlewild Airport.

4. This action is brought pursuant to Chapter 155 of the Judicial Code, 28 U.S.C. §§2281-4, for an injunction restraining the defendants from attempting to enforce the New York Alcoholic Beverage Control Law against the plaintiff because the provisions of that Law, as attempted to be applied to the plaintiff, would be unconstitutional and repugnant to the Commerce Clause, the Supremacy Clause and the clause prohibiting a state from laying impost or duties upon imports or exports without the consent of Congress, in violation of the Federal Constitution. The complaint also alleges that application to the plaintiff of the New York State Alcoholic Beverage Control Law would trespass and infringe upon the scheme adopted by Congress for the encouragement of exports of bonded wines and liquors pursuant to the Tariff Act of 1930 as amended, 19 U.S.C. §1311, and regulations thereunder, together with the applicable provisions of the Federal Internal Revenue Code, 26 U.S.C. §§5521 and 5522.

5. The defendants moved to dismiss this action on the ground, among others, that it presents no actual controversy and that the plaintiff should be remitted to the State courts to pursue its remedies there in the first instance.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

6. In their supporting brief the defendants asserted:

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

The plaintiff's motions to empanel a three-judge court and for a temporary injunction, together with the defendants' cross-motion to dismiss, came on before Judge Bicks.

7. In his decision of November 4, 1960, Judge Bicks, evidently relying on the aforesaid representations made by the defendants, held that this case was then in a "tentative and hypothetical posture" and that the plaintiff should be remitted to the State courts in the first instance. Accordingly, Judge Bicks refused the interlocutory injunctive relief sought by the plaintiff and denied the plaintiff's motion to empanel a three-judge court; but retained jurisdiction with leave to renew.

8. The plaintiff promptly appealed Judge Bicks' denial of injunctive relief.

The Defendants' Retaliatory Action

9. Five days after the plaintiff's notice of appeal was served on the defendants' attorney on November 17, 1960, the State Liquor Authority issued the *subpoena duces tecum*, dated November 22, 1960, which is the subject of

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

the plaintiff's application to quash, returnable simultaneously with this motion.

10. Notwithstanding the defendants' representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff", the subpoena required the plaintiff to appear and testify concerning its business "under the license to sell alcoholic beverages issued by the State Liquor Authority".

11. The plaintiff obtained its order to show cause to quash the subpoena late in the afternoon of Friday, November 25, 1960, from the Honorable Lloyd F. MacMahon of this Court, and the order to show cause was duly served on the attorney for the defendants on November 28, 1960.

Two days later, on November 30, 1960, as appears from the annexed affidavit of John F. Kelly, the defendants attempted to shut off the plaintiff's supply of bonded liquors, thereby driving the plaintiff out of business, by representations to the interstate trucking firm which made deliveries to the plaintiff from its out-of-state suppliers, to which the plaintiff had been driven as a result of the refusal of the plaintiff's usual suppliers to fill the plaintiff's orders as a result of the opinion of the New York Attorney General and the defendants' determination that the plaintiff's business is assertedly illegal under New York law.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

Unless the Defendants are Restrained, the Plaintiff will be Driven out of Business and with Consequent Irreparable Damage

12. Accordingly, I submit, the defendants have gone back on the representations on which they induced Judge Bicks to refuse injunctive relief and to remit the plaintiff to the State court, and are now attempting by every conceivable threat and harassment to prejudice the plaintiff's attempt to secure an adjudication of his rights and to drive him out of business, with consequent irreparable damage.

13. The defendants' retaliatory actions put this case in an entirely new light, and it is no longer in the "tentative and hypothetical posture" which the defendants asserted and Judge Bicks adopted.

14. I therefore respectfully request that the defendants be enjoined and restrained from taking any action to interfere with the plaintiff or its business during the pendency of this action.

15. The plaintiff respectfully requests that a three-judge court be convened if and to the extent that it is necessary to do so to herein determine this application and to grant the plaintiff appropriate relief.

(Sworn to by Charles H. Tuttle on December 1, 1960.)

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

JOHN F. KELLY, being duly sworn, says:

I am an attorney at law, maintaining offices for the practice of law at 1780 Broadway, New York 19, N. Y.

On December 1st, 1960, I called the offices of George's Transportation Co. Inc., at 174 Perry Street, New York City, N. Y., and spoke to Mr. Hanz. He identified himself as Manager of the said company.

Mr. Hanz stated that his company is engaged in the trucking business and is licensed by the United States Bureau of Customs and the New York State Liquor Authority in connection with its foregoing operations; and that his license from the United States Customs Bureau authorized him to transport liquor which was in customs bond and in interstate commerce and for foreign commerce.

I inquired from Mr. Hanz as to an overdue shipment of liquor which had been destined from Baltimore, Maryland, to Idlewild Bon Voyage Liquor Corp., at New York International Airport and for which the said company was the carrier from Baltimore to Idlewild Airport. This liquor was in federal customs bond and was of the class stated in the complaint herein.

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

Mr. Hanz stated that two representatives of the State Liquor Authority had visited his office on Wednesday, November 30th, 1960, and he identified the men as Mr. Harry Newman and Mr. Heelan, who had given their telephone numbers as BArclay 7-1616, Extension 7215,—the office of the State Liquor Authority.

Mr. Hanz further stated that the said representatives of the State Liquor Authority, speaking in their official capacity, had warned him that Idlewild Bon Voyage Liquor Corp. is a non-licensed receiver; that therefore he could not lawfully deliver any liquor to that corporation; and that such delivery would be in violation of his license from the Authority.

Mr. Hanz stated to deponent that he could not take a chance on losing his license and therefore he would not make any further deliveries to Bon Voyage Liquor Corp., in view of the warning from the State Liquor Authority.

Deponent inquired whether Mr. Hanz would make an affidavit as to the foregoing facts, and Mr. Hanz stated that he was fearful of losing his license from the State Liquor Authority and therefore he would have to consult with his attorney before he would sign the affidavit as to the foregoing.

(Sworn to by John F. Kelly on December 1, 1960.)

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

WALTER C. SCHMIDT, being duly sworn, says that he is a Deputy Commissioner of the New York State Liquor Authority, and is familiar with the facts and circumstances hereinafter set forth.

The New York State Liquor Authority is engaged presently in an investigation to determine whether any holders of licenses or permits issued by the New York State Liquor Authority are violating the provisions of the Alcoholic Beverage Control Law or the terms of the licenses and permits issued to them by selling or delivering alcoholic beverages to Idlewild Bon Voyage Liquor Corporation, a corporation organized and existing under the laws of the State of New York which is not the holder of any license or permit issued by the New York State Liquor Authority and the extent to which the corporation itself is trafficking in alcoholic beverages in this State.

In the course of such investigation, the New York State Liquor Authority issued and caused to be served upon Idlewild Bon Voyage Liquor Corporation the subpoena which is the subject of the motion now before this Court.

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

The proposed examination by the New York State Liquor Authority is for the purpose of eliciting from the corporation information as to the source of the alcoholic beverages it is presently engaged in selling at its place of business at New York International Airport, Jamaica, Queens County, New York, and details as to its method of operation.

It is submitted respectfully that the motion should be denied in all respects.

(Sworn to by Walter C. Schmidt December 2, 1960.)

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

PHILIP WATSON, being duly sworn, deposes and says:

That he is an Assistant Attorney General of the State of New York, in the office of Attorney General Louis J. Lefkowitz, Attorney for the defendants named in the above-entitled action, and is generally familiar with all the facts and circumstances thereof.

This affidavit is made in opposition to the motion of the plaintiff for an order staying the defendants from, among other things, interfering with the plaintiff's business.

Deponent respectfully submits that no facts have been stated in plaintiff's moving papers showing that the State Liquor Authority is interfering with the business operations of the plaintiff, or is threatening or is about to take steps, directly or indirectly, to interfere with plaintiff's business operations, except to refer to a subpoena served upon the plaintiff by the State Liquor Authority demanding that it appear, testify and give evidence relating to its business and to bring with it all records of purchases and sales of alcoholic beverages.

Deponent verily believes and respectfully submits that the real purpose of the plaintiff in making this motion is not only to stay the enforcement of the said subpoena, but also to enjoin the State Liquor Authority from exercising

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

the powers and jurisdiction conferred upon it by the New York State Alcoholic Beverage Control Law, particularly §17, subds. 7 and 10, wherein and whereby the State Liquor Authority is authorized to inspect or to provide for the inspection of any premises where alcoholic beverages are sold and to hold hearings, subpoena witnesses, compel their attendance, etc., and to require the production of any books or papers relative to the inquiry.

Your deponent verily believes and respectfully submits that the basic claim of the plaintiff is that the statutes in question as applied to the plaintiff, or if applied to the plaintiff, are unconstitutional.

Your deponent verily believes that a determination of the issues thus raised by the plaintiff, under the decision of Judge Bicks dated November 4, 1960, must be deferred until the State Court has ruled.

Your deponent further believes and respectfully submits that since an appeal has been taken from the order of Judge Bicks, the District Court has no jurisdiction to entertain this motion.

Your deponent also believes and respectfully submits that in all events it has not been shown how any great or irreparable injury could be caused the plaintiff by an exercise of the powers and jurisdiction provided by Alcoholic Beverage Control Law §17, subds. 7 and 10.

WHEREFORE, by virtue of all of the foregoing, your deponent requests that the motion of the plaintiff be denied with costs.

(Sworn to by Philip Watson on December 5, 1960.)

Notice of Entry of Stay Orders

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIRS:

PLEASE TAKE NOTICE that on the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, to quash a certain subpoena *duces tecum* dated November 22, 1960, directed to the plaintiff, and issued by the State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, which order to show cause contains a stay enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action pursuant to the aforesaid subpoena, there has been endorsed a further stay as follows:

> "Stay continued pending determination of motion. 12/7/60.
>
> /s/ Edward J. Dimock,
> U. S. D. J."

PLEASE TAKE FURTHER NOTICE, that on the plaintiff's Supplemental Notice of Motion, dated December 1, 1960, for an order, among other things, enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with

the plaintiff or the plaintiff's business during the pendency of this action, there has been endorsed a stay as follows:

> "Stay granted pending determination of motion. 12/7/60.
>
> /s/ Edward J. Dimock,
> U. S. D. J."

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State
of New York

Hyman Amsel, Esq., Counsel
State Liquor Authority

Opinion of Judge Dimock, Dated December 28, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

DIMOCK, D.J.

Plaintiff makes two motions, one for an injunction restraining defendants, constituting officials of the New York State Liquor Authority, from taking any action to hinder, harass or in any manner interfere with plaintiff or plaintiff's business during the pendency of this action, and the other to quash a subpoena issued by defendants requiring appearance and production of records by plaintiff.

The action is one for declaratory judgment that, as applied to plaintiff, section 3 subdivision 28, section 62, and section 100 subdivisions 1 and 2 of the Alcoholic Beverage Control Law of the State of New York and all other provisions of said law which defendants might claim would affect plaintiff's operation are unconstitutional under the commerce clause, U. S. Const. art. 1, §8, and the clause prohibiting states from imposing duties on imports and exports without the consent of Congress, U. S. Const. art. 1, §10, and as being preempted by the Tariff Act of 1930, 19 U. S. C. §1311, and by associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522. The complaint also seeks an injunction against the enforcement of those provisions of the Alcoholic Beverage Control Law.

A motion for a preliminary injunction in the terms of that prayed for in the complaint was denied by Judge Bicks with an opinion dated November 4, 1960.

Opinion of Judge Dimock, Dated December 28, 1960

Insofar as the present motion seeks a preliminary injunction it is a mere renewal of the motion made before Judge Bicks. An appeal from his order denying that motion is now pending undetermined in the Court of Appeals. That appeal removed the subject matter of the motion for a preliminary injunction from this court to the Court of Appeals and this court is without jurisdiction to issue a preliminary injunction in those terms. Rico Mfg. Co., Inc. v. Trico Products Corp., 1 Cir., 75 F. 2d 706, 707; Brick v. A. I. Namm & Sons, Inc., D.C.E.D.N.Y., 21 F. 2d 179. Doubtless the appeal would not have that effect if a state of facts which might have warranted a different decision by Judge Bicks were presented. The sole reason assigned by Judge Bicks for denial of the motion was, however, that plaintiff had not exhausted the state remedies open to him. Nothing has occurred since the decision which would tend to obviate the necessity of exhausting state remedies. I am thus without jurisdiction to grant an injunction pendente lite.

Plaintiff, however, seeks in the alternative an injunction pending appeal. No such application was ever made to Judge Bicks so that the question is an open one. I do not regard it as the same as the question which he decided when he denied the motion for an injunction pendente lite. Less need be shown to warrant an injunction pending an appeal than one for an injunction pendente lite.

In support of this branch of its application plaintiff invokes Rule 62(c) F. R. Civ. P. which provides:

> "(c) Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of

> the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Plaintiff has a place of business in Idlewild Airport. I will describe its business as plaintiff describes it in its papers. Its customers are prospective travelers to foreign countries from Idlewild Airport. They order and pay for liquor which plaintiff places on the plane with the passenger but to which the passenger has no access until his arrival in the foreign country. This liquor comes from Government bonded warehouses under bond until delivery on board the airplane and is not subject to United States tax so that it can be purchased at a substantial saving. Plaintiff has made arrangements with the United States Customs Bureau and the Internal Revenue Department under which permission to carry on this business has been granted.

The Attorney General of the State of New York has issued an opinion to the effect that the business so carried on by plaintiff is unlawful under the New York Alcoholic Beverage Control Law. Defendants have therefore advised plaintiff that they have determined that the operation of plaintiff's business is in conflict with the laws of the State of New York and is therefore illegal. Plaintiff made proof before Judge Bicks that the New York Importers & Distillers Association had circularized its members advising that, in view of the position of the Attorney General, under section 62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Judge Bicks found that plaintiff has not since then been able to make purchases or meet its requirements and that it faces the prospect of closing its doors with consequential damage.

Opinion of Judge Dimock, Dated December 28, 1960

In spite of this, Judge Bicks refused a preliminary injunction pendente lite because plaintiff did not exhaust the state remedies available to it. Were the question before me the same as that before Judge Bicks, even had I jurisdiction to pass on the question and reach a different result I would be constrained to follow Judge Bicks. The question before me is not, however, the same. The application before him was for an injunction pending trial and I am now considering an application for an injunction pending appeal. The hardship to the defendant of an injunction pending appeal is lighter than the injunction pending trial by just so much as the duration of the injunction pending trial exceeds the duration of an injunction pending appeal. Thus I may consider the application for an injunction pending appeal as a new question. I find that the hardship to plaintiff in the disruption of its business outweighs such hardship as the Liquor Authority might suffer during the comparatively short period of time required for the presentation and decision of the appeal. Plaintiff has presented evidence that defendants have notified at least one of the truckers delivering merchandise to plaintiff that the trucker is assisting in violations of the law and that the trucker is consequently refusing to make deliveries. Defendants openly avow their purpose to obtain, by means of a subpoena which has been served, the names of those who are supplying merchandise to plaintiff and it is a fair inference that the suppliers will be warned against aiding and abetting the performance of the allegedly illegal acts. Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce. Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks.

Opinion of Judge Dimock, Dated December 28, 1960

There remains the matter of the motion to quash the subpoena. An affidavit submitted on behalf of defendants states that the purpose of the examination sought is two-fold: first, to get the names of plaintiff's suppliers and, second, to ascertain whether plaintiff is violating the law.

Plaintiff is entitled, for the reasons above set out, to an injunction pending the appeal forbidding communication by defendants with any of plaintiff's suppliers whose names appear in any evidence or testimony obtained by plaintiff as a result of the subpoena and the injunction will so provide.

I pass now to the phase of the motion to quash the subpoena directed at the subpoena insofar as it seeks merely an examination on the subject of violations of law by plaintiff. Even if I were disposed to grant that relief I could not do so in this law suit. Neither by its allegations of fact nor by its prayer does the complaint raise any issue as to defendants' right to subpoena plaintiff to give testimony as to whether it is conducting operations more extensive than those for which plaintiff seeks protection.

Since the injunction will protect plaintiff, pending the appeal, against use against it of the fruits of the subpoena insofar as they constitute evidence with respect to its avowed activities and since I have no power in this law suit to quash the subpoena insofar as it seeks evidence of other alleged infractions of law, the motion to quash will be denied.

Settle order on notice. Bond in the sum of $1,000 will be required. All existing stays are continued pending entry of the order.

Dated: December 28, 1960

E. Dimock
United States District Judge

Order of Judge Dimock, Dated January 4, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The plaintiff having moved for an order temporarily enjoining and restraining defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action or, in the alternative, during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960; and the plaintiff having further applied for, and renewed its application for, the empanelling of a three-judge court; and the plaintiff having further applied for an order quashing a certain subpoena *duces tecum*, dated November 22, 1960 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners respectively; and said motions having duly come on to be heard before me on December 7, 1960; and Kelly & Schwartz, attorneys for plaintiff, by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing the plaintiff's application to quash the aforesaid subpoena *duces tecum* by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, the affidavit of Charles H. Tuttle, verified November 25, 1960, together with the exhibits annexed thereto, in support of the said application, and the affidavit of Walter C. Schmidt, verified December 2, 1960, in opposition thereto; the plaintiff's supplemental

notice of motion, dated December 1, 1960, for a temporary injunction and for other relief, as aforesaid, the supplemental affidavit of Charles H. Tuttle, verified December 1, 1960, the affidavit of John F. Kelly, verified December 1, 1960, and the affidavit of John F. Kelly, verified December 5, 1960, all in support of the said motion, and the affidavit of Philip Watson, verified December 5, 1960, in opposition thereto, and due deliberation having been had thereon, and on filing the opinion of the Court, dated December 28, 1960, it is hereby

ORDERED that the plaintiff's motion for a temporary injunction pending the trial of this action and for the empanelling of a three-judge court be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's application to quash the aforesaid subpoena *duces tecum* be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further.

Order of Judge Dimock, Dated January 4, 1961

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum;* and it is further

ORDERED that the plaintiff will be required to post a bond in the sum of One Thousand Dollars ($1,000.00) pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., January 4, 1961

EDWARD J. DIMOCK
U. S. D. J.

Plaintiff's Notice of Appeal from Decision and Order of Judge Dimock, Dated January 6, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, insofar as the said decision and order refused the plaintiff's motion for a temporary injunction pending the trial of this action; denied the plaintiff's motion for the empanelling of a three-judge court; and denied the plaintiff's application to quash a certain subpoena *duces tecum*, dated November 22, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively.

Dated: New York, N. Y., January 6, 1961.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff

To

Hon. LOUIS J. LEFKOWITZ
Attorney-General of the State of New York
Attorney for Defendants

Notice of Motion to Dismiss Appeal

SIRS:

PLEASE TAKE NOTICE that upon the order of Judge Bicks entered herein on November 4, 1960, denying plaintiff's motion for impanelling a three-judge court and for other relief, and upon the notice of appeal from such order dated November 16, 1960, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is not appealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Appellant

Memorandum of Points

The appellees, above-named, intend to raise the following points in support of the motion to dismiss the appeal.

This Court lacks jurisdiction of the appeal.

1. The order appealed from is not a final decision within the meaning of 28 U. S. C., Section 1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of 28 U. S. C., Section 1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for the Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Appellant

Notice of Motion to Dismiss Appeal

SIR:

PLEASE TAKE NOTICE that upon the order of Judge Edward J. Dimock dated January 4, 1961 and entered herein on January 6, 1961 denying plaintiff's motion for a temporary injunction, denying motion for the impanelling of a three-judge court, and denying plaintiff's application to quash a subpoena duces tecum; and upon the notice of appeal from such order dated January 6, 1961, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is unappealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff

Memorandum of Points

The appellees, above named, intend to raise the following points in support of the motion to dismiss the appeal:

The Court Lacks Jurisdiction of the Appeal

1. The order appealed from is not a final decision within the meaning of Title 28 U. S. C. §1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of Title 28 U. S. C. §1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Plaintiff

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of November 4, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of December 28, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Opinion of the Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge*,
MADDEN, *Judge, United States Court of Claims*,*
and WATERMAN, *Circuit Judge*.

Motions to dismiss appeals from orders of the United States District Court for the Southern District of New York, Alexander Bicks, J., Edward J. Dimock, J., denying motions to impanel a three-judge district court, for a preliminary injunction, and to quash a subpoena, and staying further proceedings pending state court adjudication.

Motions to dismiss granted.

KELLY & SCHWARTZ (Breed, Abbott & Morgan, Charles H. Tuttle, John F. Kelly, Stoddard B. Colby, Stuart H. Johnson, Jr. of counsel), New York City, *for Plaintiff-Appellant*.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Philip Watson, Assistant Attorney General, of counsel), Albany, New York, *for Defendants-Appellees*.

WATERMAN, *Circuit Judge*:

Plaintiff filed a complaint against the defendants, members of the State Liquor Authority of the State of New York. It sought declaratory and injunctive relief from actions taken by them pursuant to the New York Alcoholic Beverage Control Law of the State of New York §§3(28), 62 and 100. Plaintiff alleges that defendants' activities were unconstitutional under the U. S. Constitution, being repugnant to (a) the commerce clause, and (b) the clause

* Sitting by designation.

that prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports.

Plaintiff applied to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. §§2281, 2284, for the convening of a three-judge court to hear and determine the controversy. The single-judge district court issued an order directing the defendants to show cause before a three-judge district court why the relief sought by the plaintiff should not be granted. Before the order to show cause came on to be heard defendants moved to dismiss the complaint. It would appear that the application for the impaneling of a three-judge district court, the order to show cause, and the motion to dismiss were simultaneously heard by Judge Bicks, who denied the application for a three-judge district court, and, in effect, granted defendants' motion to dismiss (188 F. Supp. 434 (1960)). The ground for Judge Bicks' action was that no state court had passed upon the constitutional issues raised, and he was of the opinion that the federal courts should abstain from doing so until there had been state adjudication. Implicit in this disposition and opinion is a finding that a substantial federal question existed which could properly be considered by a three-judge district court after some intervening state adjudication. Plaintiff was given leave to renew its motion after a state court had ruled—whenever there should be such a ruling. It should be noted that no state court action involving these parties or these issues was pending at the time.

From this decision and order, *Idlewild Bon Voyage Liquor Corporation* v. *Rohan*, 188 F. Supp. 434 (S. D. N. Y. Nov. 4, 1960) plaintiff filed a notice of appeal, and thereafter plaintiff obtained an order to show cause why defendants should not be enjoined and restrained from interfering with plaintiff's business during the pendency thereof. It also sought to quash an administrative sub-

poena *duces tecum* the defendants issued under the authority of the New York State Beverage Control Law to appear before defendants with its books, and renewed its application for the impaneling of a three-judge district court. Judge Dimock, after a hearing, granted the motion for the interlocutory injunction pending the appeal; denied the motion to quash; and, relying upon Judge Bicks' decision, refused to impanel a three-judge district court. Appellant appeals to us from the rulings adverse to it entered by both judges. Defendants-appellees have now moved for an order dismissing both appeals on the ground that we lack jurisdiction to hear them.

We are of the opinion that we must grant appellees' motion and are required to dismiss these appeals for lack of appellate jurisdiction.

I—*The Order of Judge Bicks*

This order denied the petition to convene a three-judge district court because there had been no prior state adjudication of the issues. The judge relied upon the doctrine of "equitable abstention" originally set forth in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941) "that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."[1] There was, however, as we have previously pointed out, no state action pending. Judge Bicks "retained jurisdiction" of the litigation pending state court adjudication. Appellees' argument that this order was not final and hence unappealable under 28 U. S. C. §1291, 1292 is not well taken. No parallel state

1. *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, at 176-77. And see Note, 59 Colum. L. Rev. 749 (1959).

actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court —any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (5 Cir. 1960).

However, the order of Judge Bicks had the effect of dismissing a complaint challenging the constitutionality under the Federal Constitution of a state statute and challenging it because of the way that statute was being applied by the regulatory commission created by it. *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10 (1930) in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity. And, recently, in *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960) the Court reaffirmed this position by holding that even where state activity was challenged on both constitutional and nonconstitutional grounds a three-judge district court was the proper tribunal. In *Stratton* the Court said that, since this was so, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., *Ex Parte Bransford*, 310 U. S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court. Of course, strict adherence to the *Stratton* command creates obvious difficulties, for whenever there is a pleader's allegation of a constitutional infirmity a single judge is required to re-

quest that a three-judge district court be convened. To deal with this problem a procedure has been developed whereby the district judge to whom the application is made is charged with making a preliminary determination as to whether a "substantial federal question" exists that necessitates the convening of a three-judge district court.[2] Judge Friendly, for our court, in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2 Cir. 1960), traces the development of this procedure, and that case holds that an appeal from a determination that no such substantial federal question exists is properly preferred to the Court of Appeals. Accord, *Stuart* v. *Wilson*, 282 F. 2d 539 (5 Cir. 1960); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 139 (9 Cir. 1956).

The equitable abstention doctrine referred to by us in this opinion was recently carefully articulated in *Harrison* v. *NAACP*, 360 U. S. 167 (1959), where the Supreme Court remanded a cause for state consideration. The Court reasoned that in order for a federal court to give proper consideration to the issue of constitutionality it should have a finished product before it, i.e., not only the state legislative act but also that act as construed by the state courts. At the same term, in a later opinion, the Court pointed out that a reference of this sort to a state court should not be an automatic reference, *NAACP* v. *Bennett*, 360 U. S. 471 (1959). Moreover, there was no indication that the choice of whether to abstain could be the choice of a single district judge. In *Bennett* the appeal was from and the remand was to a three-judge district court.

The decision to abstain is a very different decision from the preliminary one of determining whether the case in-

2. As previously indicated, a finding that a substantial federal question existed was implicit in Judge Bicks' decision.

volves a substantial federal question. Such a determination, not being automatic, presupposes that the court has jurisdiction to decide the controversy even though it may, after due consideration, choose to surrender temporarily its power to decide. Inasmuch as *Stratton* has made it clear that only a three-judge district court has the requisite jurisdiction to decide a complaint seeking injunctive relief from acts sought to be justified by reliance upon a state statute because the statute, so applied, is repugnant to the federal constitution [3] we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.[4]

Stratton v. *St. Louis S. W. Ry., supra*, is undeniable authority for the proposition that no appeal may be preferred to a court of appeals from an action taken by a district judge upon an application to convene a three-judge district court unless there first was jurisdiction in the district court over the subject matter ruled upon. Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision. To be sure, this result leaves us in a somewhat anomalous position. A court of appeals as a matter of course entertains appeals that claim a lack of jurisdiction in a district court and a court of appeals so importuned has jurisdiction to determine whether the district court's powers, so challenged, were exercised within district court jurisdiction. Anomalous as our position is, we feel bound by the Supreme Court's opinion in *Stratton*, an opinion which that Court has never seen fit to reverse, and to which it

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3. Accord, *Query* v. *United States*, 316 U. S. 486 (1942).

4. See *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U. S. 341, 350 (1951). Contra, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 at 320 (6 Cir. 1958).

has given its approval when construing a companion section, 28 U. S. C. §2282. *Ex Parte Cogdell*, 342 U. S. 163 (1951).

In *Bell* v. *Waterfront Commission of New York Harbor*, *supra*, we first found that the district court could determine the preliminary question of whether there was a substantial federal question to be adjudicated upon, and therefore the court of appeals had jurisdiction to review that preliminary determination. Though the result we reach here of denying to a one-judge district court, and to ourselves, the power similarly to determine a jurisdictional question, the jurisdictional question itself is a quite dissimilar one,[5] and in determining the issue before us we are constrained to follow *Stratton*. Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss. Accord, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 319 (6 Cir. 1958).

II—*The Order of Judge Dimock*

Falsone v. *United States*, 205 F. 2d 734 (5 Cir.), *cert. denied*, 346 U. S. 864 (1953), held that the denial of a motion to quash a subpoena of an administrative agency, unconnected with litigation, is a final order and therefore appealable. In *In Re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2 Cir. 1953), *cert. denied sub nom. Cincotta* v. *United States*, 347 U. S. 960 (1954), this court expressly followed the *Falsone* case. There would appear, therefore, under ordinary circumstances to be no doubt as to the appealability of an order denying a motion to quash. However, the order before us on appeal was sought below

5. See *Board of Supervisors* v. *Turcad*, 207 F. 2d 807 (5 Cir. 1953), judgment vacated on other grounds and cause remanded, 347 U. S. 971 (1954).

on the ground that the issuance of the subpoena was repugnant to the federal constitution. In such a situation 28 U. S. C. §2281 requires that a three-judge district court be convened if a substantial federal question exists. *Bell* v. *Waterfront Commission of New York Harbor, supra.* Therefore, though the issue is a different one from the one before Judge Bicks, in considering whether we may entertain the purported appeal we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order. This result is required under the *Stratton* doctrine.

The refusal by Judge Dimock to request that a three-judge district court be convened is, of course, subject to the same infirmity that Judge Bicks' refusal was. This order was but a reaffirmation of the earlier decision.

Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court.

The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief. However, as we understand *Stratton*, the Supreme Court has determined that we are not the proper tribunal to adjudicate the issues raised by the purported appeals.

Appeals dismissed.

Opinion of the Court of Appeals for the Second Circuit

LUMBARD, *Chief Judge* (dissenting):

Agreeing with my brethren that the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable,[1] I would deny the motion to dismiss and would hear the appeals to decide first whether the single district judges had jurisdiction to act as they did and then proceed, if it is found that they did have jurisdiction, to consider the merits.

The appellees argue here, and my brethren agree with them, that even if these orders are appealable in form, no review of the merits may be made by this court. Since an injunction restraining the enforcement of a state statute on the ground that it violates the federal Constitution may be issued only by a three-judge court, 28 U. S. C. §2281, the appellees contend that the single district judge had no jurisdiction to entertain the application, and that this lack of jurisdiction may be attacked only by way of mandamus in the Supreme Court. The appellees, who thus find themselves in the odd posture of urging upon this court lack of jurisdiction in the district court in order to preserve for their benefit the very order which they claim was entered without jurisdiction, cite dictum in *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10 (1930), in support of their position.[2]

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1. See, in addition to the *Glen Oaks Utilities* case cited in the majority opinion, *NAACP* v. *Bennett*, 360 U. S. 471 (1959), where, on appeal from an order of a three-judge court retaining jurisdiction, the Supreme Court considered the merits without discussing the issue of appealability.

2. "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal

It is clear beyond any doubt that if a district judge, without entering an appealable order, rules that he, sitting alone, will hear a request for an injunction restraining the enforcement of a state statute, the appropriate remedy for a party requesting a three-judge court is by writ of mandamus in the Supreme Court. E.g., *Ex parte Bransford*, 310 U. S. 354 (1940); see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 360 (1951 ed.) and authorities there cited. A court of appeals would not then have appellate jurisdiction under 28 U. S. C. §§1291, 1292. Nor would it be proper for a court of appeals itself to enter a writ of mandamus since the courts of appeal have no appellate jurisdiction over cases decided by three-judge district courts and could not, therefore, satisfy the requirement of 28 U. S. C. §1651 that such writs may issue only "in aid of their * * * jurisdictions." See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

In this case, however, the district court has proceeded to enter orders which meet the standards for appellate review prescribed by 28 U. S. C. §§1291, 1292. The appellees urge that nonetheless this court should dismiss the appeals for lack of jurisdiction and leave the appellant with its remedy of mandamus in the Supreme Court. If, in fact, the district judges exceeded their jurisdiction in

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lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

"Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." 282 U. S. 15-16.

entering the orders before us on appeal, we would surely be barred from considering the merits underlying their decisions. 28 U. S. C. §1253 directs that in "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges" an appeal may be taken from a denial of an interlocutory or permanent injunction directly to the Supreme Court. But I think we have the jurisdiction and the statutory obligation to hear this appeal and first decide whether the orders did exceed the jurisdiction of district judges sitting alone in the district court, and whether the suit was of the kind which should have been presented to a district court of three judges. *Diggs* v. *Pennsylvania Public Utilities Comm'n*, 180 F. 2d 623, 629 (3d Cir. 1950).

If we hold that Judge Bicks was required to impanel a three-judge court, we must vacate his order and that of Judge Dimock for lack of jurisdiction, and we can go no further. *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 433 (3d Cir. 1959); *Board of Supervisors* v. *Tureaud*, 207 F. 2d 807 (5th Cir. 1953). But see *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); *Waddell* v. *Chicago Land Clearance Comm'n*, 206 F. 2d 748 (7th Cir. 1953). If, on the other hand, we hold that the issues before the district judges were not for a three-judge court either because the challenge to the state statute was not of the type comprehended by 28 U. S. C. §2281 or because the question of "equitable abstention" is analogous to the threshold jurisdictional determination of a substantial federal question, which is to be decided by the single district judge and reviewed by the court of appeals, *Bell* v. *Waterfront Comm'n*, 279 F. 2d 853 (2d Cir. 1960), we should proceed to the merits as we would in any other case in which the jurisdiction of a district judge is attacked and is upheld. Cf. *Query* v. *United States*, 121 F. 2d 631 (4th Cir. 1941),

vacated on other grounds, 316 U. S. 486 (1942); *Capital Service, Inc.* v. *United States District Court*, 198 F. 2d 18 (9th Cir. 1952).

Jurisdictional questions are surely not beyond the scope of this court's authority. We are often called upon to decide whether diversity jurisdiction was properly exercised by a district court, although in deciding that it was not we must vacate the decision below and oust ourselves of jurisdiction to go any further. Underlying the majority's opinion is the assumption that matters which should be considered only by a three-judge court and by the Supreme Court should not be presented to this court—that supervision over three-judge panels should rest with the Supreme Court only. But even when the issue is whether a case was one as to which original jurisdiction lay exclusively with the Supreme Court, courts of appeal have passed on the jurisdictional issue after a final order was entered and have not required the parties to seek relief by way of mandamus in the Supreme Court. See *United States* v. *State of Washington*, 233 F. 2d 811 (9th Cir. 1956); *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), *cert. denied*, 313 U. S. 586 (1941).

If we were now to decide the jurisdictional question the Supreme Court could, of course, review our determination on certiorari or even by a writ of mandamus. The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to

consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions.

It is true that the dictum in the *Stratton* case, *supra*, appears to indicate that even after an appealable order is entered by the district court, the only means of vacating it is by mandamus in the Supreme Court. But it seems to me that the Supreme Court in *Stratton* was concerned with the effects of appellate review of the *merits* of an unauthorized order entered by a single district judge and did not proscribe ordinary review of matters going to the *jurisdiction* of the single district judge if his order is otherwise appealable. See Hart & Wechsler, The Federal Courts and the Federal System 853 (1953).

For these reasons I would deny the motion to dismiss.

Judgment Dated April 14, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of April, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. J. WARREN MADDEN, Judge, Court of Claims
Hon. STERRY R. WATERMAN, Circuit Judge.

Motions having been made herein by counsel for the appellees to dismiss the appeals of November 4, 1960 and December 28, 1960, for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motions be and they hereby are granted and that the appeals from orders of the United States District Court for the Southern District of New York be and they hereby are dismissed.

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

Upon the annexed affidavit of Charles H. Tuttle, verified April 18, 1961, upon the complaint herein and the exhibits annexed thereto, upon the opinion and order of the Honorable Alexander Bicks herein, dated November 4, 1960, the opinion and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, the opinion of the United States Court of Appeals for the Second Circuit herein, dated April 14, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and attempted by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and Laws of the United States, (2) such actions, if taken by the defendants in accordance with their threats so to do, would result in irreparable injury to the plaintiff, (3) there are good and sufficient reasons to bring on this motion by order to show cause, and (4) due notice of the hearing on this order to show cause may be given to the Governor and Attorney-General of the State of New York,

LET the defendants, and each of them, show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, N. Y., at 10:00 a.m. on the 25th day of April, 1961, or as soon thereafter as counsel can be heard, why an order should not be entered:

(1) Convening a District Court of three judges pursuant to 28 U.S.C. §2281 for the hearing of this cause and

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

of the plaintiff's motion for an injunction, both preliminary and permanent, and granting the plaintiff's request, hereby made, that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified, pursuant to 28 U.S.C. §2284, of the presentation of this application for an injunction in order that the necessary designation of three judges for said Court may be made;

(2) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff the provisions of the Alcoholic Beverage Control Laws of the State of New York, particularly Section 3(28), Section 62, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges;

(3) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges; and it is

Ordered, that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants, on or before the 19th

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

day of April, 1961 at 5:00 p.m. shall constitute good and sufficient service of this order to show cause, and it is further

ORDERED that notice of the hearing on this order to show cause be given by mailing a copy thereof by registered mail to the Governor and the Attorney-General of the State of New York at least five (5) days prior to April 25, 1961, the date of the hearing on this order to show cause; and it is further

ORDERED, that the defendants' opposing papers be served on the plaintiff's attorneys by April 24, 1961 at 10:00 a.m.

Dated: New York, N. Y., April 18, 1961.

JOHN M. CASHIN
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Plaintiff's Application

State of New York, }
County of New York, } *ss.:*

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application by order to show cause (1) for the convening of a three-judge District Court pursuant to 28 U. S. C. §§2281 and 2284 to hear and determine this action and the plaintiff's motion for an injunction, both preliminary and permanent, and (2) for an order restraining the defendants, being the Chairman, Members and Commissioners, respectively of the New York State Liquor Authority, (a) from enforcing against the plaintiff the provisions of the Alcoholic Beverage Control Law of the State of New York, and (b) from hindering, harassing or interfering with the plaintiff or the plaintiff's business, pending the hearing by a District Court of three judges on the plaintiff's application for a preliminary injunction so restraining the defendants *pendente lite*.

The Recent Decision of the United States Court of Appeals

2. This application is made pursuant to the decision of the U. S. Court of Appeals for the Second Circuit herein, dated April 14, 1961 (Exhibit A hereto) dismissing the plaintiff's appeals from the decisions and orders of Judge Bicks and Judge Dimock, and holding (p. 1444) that "a

three-judge district court should have been convened", as sought by the plaintiff to hear and determine the plaintiff's application for the relief here again requested.

3. The Court of Appeals also stated (p. 1445) that this plaintiff "is entitled to relief".

Nature and History of this Case

4. The history of this case, including the decisions and orders of Judge Bicks and Judge Dimock, is set forth in full in the Appendix to Appellant's Brief in the U. S. Court of Appeals (Exhibit B hereto). The plaintiff's position as to the applicable law is set forth in its Appellant's Brief in U. S. Court of Appeals (Exhibit C hereto). Accordingly, I shall merely undertake to summarize the nature and history of this case to date.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor exclusively for export to overseas passengers emplaning for foreign countries at Idlewild Airport. Its business is conducted under comprehensive regulation by the U. S. Bureau of Customs.

6. The State Liquor Authority, however, determined that the plaintiff's business "is in conflict with the Laws of the State of New York and, therefore, will be illegal."

7. The result was to dry up the plaintiff's source of supplies in New York State. As Judge Bicks found (Appellant's Appendix 53a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not

legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

8. Accordingly, the plaintiff instituted this action for a declaratory judgment, with appropriate injunctive relief, that the provisions of the New York Alcoholic Beverage Control Law, as the defendants seek to apply it to the plaintiff's export business, are unconstitutional under (i) the Commerce Clause (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress and (iii) the Supremacy clause of the Constitution of the United States.

9. The complaint also alleges that the Tariff Act of 1930, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522, constitute a comprehensive, exclusive and preemptive scheme adopted by Congress for the regulation and promotion of foreign commerce in, and export of, bonded wines and liquors.

10. Judge Bicks, in his decision and order of November 4, 1960 (Appellant's Appendix 51a-57a, 188 F. Supp. 434). refused the plaintiff's initial request for the convening of a three-judge District Court and for a temporary injunction, —the very relief here sought. Instead, Judge Bicks held that the plaintiff should be required to resort to the New York State courts in the first instance, but he retained jurisdiction of this case with leave to the plaintiff to renew its application for the relief here sought "after the state court has ruled".

Affidavit of Charles H. Tuttle in Support of Application

11. The U. S. Court of Appeals, however, citing *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, held (pp. 1442, 1443, 1444):

> "* * * we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.
>
> * * *
>
> "Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision.
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> * * *
>
> "Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss."

12. In the *Stratton* case, thus cited by the Court of Appeals as determinative in this case, the Supreme Court held (282 U. S. at p. 18) that although the remedy by mandamus to require the convening of a three-judge District Court was still available,

> "It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require."

13. Thus the Court of Appeals has now held that the plaintiff is entitled to have a three-judge District Court convened in this case, and the Supreme Court in the *Stratton* case has held that a formal application to it for mandamus is "not necessary * * * as the District Judge may now proceed to take the action which the writ, if issued, would require".

14. The Appellant's Brief in the Court of Appeals fully sets forth the reasons why in the plaintiff's view, the three-judge District Court should exercise,—not abdicate, its statutory jurisdiction to hear and determine this case. Accordingly, I shall not repeat those reasons here.

15. After the plaintiff appealed from Judge Bicks' decision, the State Liquor Authority retaliated by attempting to choke off the plaintiff's life-line of supply from out-of-State sources to which the plaintiff had been driven because its New York suppliers had been frightened off by the defendants' prior determination of illegality.

16. This effort to drive the plaintiff out of business before it could obtain a federal adjudication of its federal rights was attempted first under color of State law by an administrative *subpoena duces tecum* directed to the plaintiff and admittedly designed to ascertain the identity of the plaintiff's suppliers and truckers (Appendix to Appellant's Brief 84a-85a).

17. When they were temporarily restrained by Judge MacMahon's order to show cause from proceeding pursuant to the subpoena, however, the defendants resorted to overt threats to the several U. S. Customs bonded interstate truckers who had been making deliveries to the plaintiff (Appendix to Appellant's Brief 59a-60a, 78a, 80a-83a).

18. The plaintiff's applications for injunctive relief against such overt harassment and interference came on before Judge Dimock who rendered a decision and order granting a stay restraining the defendants from such activity pending the plaintiff's appeal. Judge Dimock, however, denied the plaintiff's motion for a similar injunction

pendente lite, for the empanelling of a three-judge District Court and for an order quashing the *subpoena duces tecum*.

19. The Court of Appeals dismissed the plaintiff's appeal from Judge Dimock's denials of the relief it sought holding (p. 1444) that since "a substantial federal question exists * * * Judge Dimock exercised power exercisable only by a three-judge district court". The Court of Appeals added (p. 1445):

> "Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court."

20. The Court of Appeals concluded (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to *a party who we believe is entitled to relief*." (Emphasis added.)

21. The plaintiff now seeks the relief to which the Court of Appeals, in the plaintiff's view, has said it is entitled. Plaintiff's reasons for believing that it is entitled to such relief are set forth in the Appellant's Brief in the Court of Appeals (pp. 38-43) and need not be repeated here.

There Are "Good And Sufficient Reasons" For Proceeding Here By Order To Show Cause

22. Although the Court of Appeals held (p. 1445) that "the stay pending appeal granted by Judge Dimock * * * was properly issuable only by a three-judge district court," the Clerk of the Court of Appeals has advised my office

that Judge Dimock's stay remains in effect until April 29, 1961, when the mandate will issue fifteen days after the decision of the Court of Appeals on April 14, 1961. (Rule 28(b) of the U. S. Court of Appeals for the Second Circuit).

23. Under new Rule 9(c)(2) of this Court ten days' notice of motion is required for an application of this character unless there are "good and sufficient reasons" for resorting to an order to show cause.

24. Under Rule 9(o)(2), however, motions requesting relief of the type here sought are to be heard on Tuesdays "unless the judge assigned to the Motion Part otherwise directs."

25. Accordingly, the first Tuesday for which this application could be brought on for hearing on ten days' notice would be May 2, 1961,—three days after the issuance of the mandate of the Court of Appeals and the consequent expiration of Judge Dimock's stay restraining the defendants from harassment or interference with the plaintiff or its business.

26. Accordingly, the plaintiff's past experience furnishes "good and sufficient reasons" for resorting to an order to show cause here so that this application for an appropriate stay continuing and amplifying the stay granted by Judge Dimock, may be heard and determined by this Court before Judge Dimock's stay expires.

27. The one week notice will provide ample time to give the statutory five days' notice of the hearing to the Governor and the Attorney-General of the State of New York as required by 28 U. S. C. §2284(2).

Affidavit of Charles H. Tuttle in Support of Application

28. Furthermore, one week should provide ample time for the Attorney-General of the State of New York, who represents the defendants here and is fully familiar with every step of this case, to formulate his position on this application. Accordingly, since Rule 9(c)(2) of this Court contemplates service of answering papers three days before the return day, the order to show cause provides for service of the defendants' papers one day prior to the hearing.

29. No previous application has been made for the relief herein sought except to the extent stated above.

WHEREFORE, I respectfully submit that the plaintiff is plainly entitled under the decision of the Court of Appeals to the convening of a three-judge District Court and to the interim relief here requested. Accordingly, I respectfully request that this order to show cause issue as prayed.

(Sworn to by Charles H. Tuttle on April 18, 1961.)

Restraining Order Issued by Judge Cashin on April 25, 1961

The plaintiff having moved by order to show cause dated April 18, 1961, for an order convening a District Court of three judges pursuant to 28 U. S. C. §2281 for the hearing of this cause and for an injunction, both preliminary and permanent, restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business, and for other relief, and said motions having duly come on to be heard before me on April 25, 1961; and Kelly & Schwartz, attorneys for plaintiff by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing plaintiff's aforesaid application by order to show cause issued by Honorable John M. Cashin on April 18, 1961; and the affidavit of Charles H. Tuttle, verified April 18, 1961, together with the exhibits annexed thereto, in support of the said application, and after hearing argument by Charles H. Tuttle, Esq., in support of the said application and by Philip Watson, Esq., in opposition thereto, and it appearing to the Court that the plaintiff may be irreparably damaged unless the Court continues the temporary injunction heretofore granted by the Honorable Edward J. Dimock herein by order dated January 4, 1961 pending the determination of plaintiff's aforesaid application for the convening of a three-judge District Court, it is hereby

Ordered, that the plaintiff's motion for an order temporarily enjoining and restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the decision on the plaintiff's application for an order con-

vening a three-judge Court herein be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the determination of the aforesaid application, and it is further

ORDERED, that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff by the defendants; and it is further

ORDERED that the bond in the sum of $1,000, heretofore posted by the plaintiff pursuant to the order of the Honorable Edward J. Dimock herein, dated January 4, 1961, shall be proper security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., April 25, 1961.

Signed at 5:15 P.M.
John M. Cashin
U. S. D. J.

JOHN M. CASHIN
U. S. D. J.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

Appearances:

KELLY & SCHWARTZ, Esqs.,
Attorneys for Plaintiff
1780 Broadway, New York, N. Y.

Charles H. Tuttle, Esq.
John F. Kelly, Esq.
Stoddard B. Colby, Esq.
Stuart H. Johnson, Jr., Esq.
Of Counsel.

HON. LOUIS J. LEFKOWITZ,
Attorney General of the State of New York
Attorney for Defendants
80 Centre Street, New York, N. Y.

Philip Watson, Esq.
Assistant Attorney General
Of Counsel.

CASHIN, D. J.

This is a motion to impanel a three-judge district court pursuant to 28 U. S. C. §2281 brought on by an order to show cause. The plaintiff, a New York corporation, is engaged in selling bottled wines and liquors solely for export to overseas passengers from premises at Idlewild Airport. The defendants are the Chairman, Members and Commissioners of the New York State Liquor Authority.

The liquor sold by plaintiff is placed upon the passengers' planes for delivery only upon arrival at their foreign destinations. The liquor cannot be diverted for any purpose other than export from the United States. The United

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

States Treasury Department, Bureau of Customs, has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311.

The United States Bureau of Customs has approved and supervises the plaintiff's premises. The liquors sold by plaintiff are purchased solely for export from vendors who withdrew the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for re-warehousing at the United States Customs-controlled space in plaintiff's premises. Pursuant to the Internal Revenue Code, each bottle plaintiff withdraws is labeled "Bottled for export from the U. S. A.".

Plaintiff sought a ruling from the New York State Liquor Authority as to whether its conduct set forth above contravenes the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney General (See 1960, Op. Atty. Gen. June 30) which was to the effect that the plaintiff's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28); that there is no provision of that law which would authorize a license for such sales, and that no person can sell alcoholic beverages within New York without a license. Thereafter, the New York Importers and Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law they could not legally fill plaintiff's orders.

This action was then instituted on July 22, 1960. The plaintiff urged at that time that the provisions of the New York State Alcoholic Beverage Control Law are uncon-

stitutional, as applied to plaintiff, under (i) the Commerce clause; (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress; and (iii) the Supremacy clause of the Constitution of the United States. Plaintiff argued at that time that the 1930 Tariff Act as amended, the regulations adopted thereunder, and the applicable provisions of the Internal Revenue Code, constituted a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in bonded liquors.

Plaintiff sought declaratory judgment to that effect, injunctive relief, and moved for the impaneling of a three-judge district court pursuant to 28 U.S.C. §2281, 2284. Judge Bicks of this Court denied plaintiff's motion to impanel a three-judge district court until after a state court has ruled on the constitutional issues. (188 F. Supp. 434 (1960)). Plaintiff appealed Judge Bicks' decision and also moved before Judge Dimock of this Court for an injunction restraining defendants from interfering with plaintiff's business during the pendency of this action, and for other relief not germane to the present motion. Judge Dimock refused to grant a preliminary injunction because the request was a mere renewal of the motion made before Judge Bicks. He did, however, issue an injunction against harassment by defendants pending the appeal from the order of Judge Bicks. Thereafter, the plaintiff appealed from the orders of Judge Bicks and Judge Dimock to the Circuit Court of Appeals.

On April 14, 1961 the Court of Appeals handed down its decision (Idlewild Bon Voyage Liquor Corporation v. Rohan (2 Cir. April 14, 1961) —— F. 2d ——). It stated by way of dictum that a three-judge district court should have been convened. It held, however, that in light of

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

Stratton v. St. Louis S. W. Ry., 282 U.S. 10 (1930) it was without jurisdiction to hear the appeals and granted defendants' motion to dismiss them. It said that—

> "In Stratton the Court said that, * * *, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., Ex Parte Bransford, 310 U.S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court."

As I construe the decision of our Circuit Court of Appeals it said that plaintiff's only remedy was by way of mandamus to the Supreme Court of the United States and, accordingly, dismissed the appeals because it had no jurisdiction to hear them. The mandate in this decision has not, as of this date, come down. It is true that the decision of the Circuit Court of Appeals did say that Judges Bicks and Dimock were in error and that a three-judge district court should have been appointed. However, I consider this as dictum. I consider Judge Bicks' and Judge Dimock's orders as still in full force and effect.

Thereafter, and on April 18, 1961, I signed an order directing defendants to show cause why an order should not be entered convening a three-judge district court pursuant to 28 U.S.C. §2281. Thus, I have before me the same issue on which Judge Bicks and Judge Dimock have already ruled. Their decisions are still the law of this case.

Plaintiff argues that on the basis of the dictum in the Court of Appeals decision dismissing the appeals from

Judges Bicks' and Dimock's decisions, I should now convene a three-judge district court. Defendants urge that plaintiff's motion should be denied because the issues are res judicata and that plaintiff's only remaining remedy in the United States courts is mandamus.

Whether or not I have the power to convene a three-judge district court at this time is questionable. In *In re Hines*, (2 Cir. 1937) 88 F. 2d 423, Judge Swan stated:

> "It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion; it is the law of the District Court, to be followed, upon similar facts, until a different rule is laid down by a court of superior jurisdiction. • • • Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges."

However, it appears that this doctrine has been modified to some extent in *Dictograph Products Company v. Sonotone Corporation*, (2 Cir. 1956) 230 F. 2d 131, dismissed per stipulation 352 U.S. 883 (1956). (see also *Higgins v. California Prune & Apricot Grower*, (2 Cir. 1924) 3 F. 2d 896, 898; *First National Bank in Greenwich v. National Airlines, Inc.*, (2 Cir. April 6, 1961) F. 2d). However, what was involved in these latter cases was either a non-appealable order or a ruling in the meantime by a higher court on the issue in question.

In the instant case the Court of Appeals, in its decision handed down on April 14, 1961, stated that—

> "Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. §1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

> There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See Glen Oaks Utilities, Inc. v. City of Houston, 280 F. 2d 330 (5 Cir. 1960)."

Although it is true that since Judge Bicks rendered his decision a higher court has spoken on the matter, that court had no jurisdiction over the subject matter and whatever it said on the matter was dictum.

Assuming, however, that I have the power to overrule Judge Bicks and Judge Dimock, I will not so exercise it. This is not a situation where plaintiff has no other remedy. Plaintiff has other courses open to it. The most obvious is to move before Judge Bicks for reargument in light of the Court of Appeals decision. (see Rule 34 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York). The other remedy is a writ of mandamus. In *Stratton*, supra, the Supreme Court ruled that where a court of three judges should have been convened and was not, the remedy was a writ of mandamus vacating the order of the District Judge and directing him to convene a three-judge court. This view has been adhered to in later cases. (*Ex Parte Bransford*, 310 U.S. 354 (1940); *Ex Parte Cogdell*, 342 U.S. 163 (1951).

Instead of either of these courses, plaintiff has renewed its motion for the impaneling of a three-judge district court. Accordingly, the motion for the appointment of a three-judge court is denied.

It is so ordered.

Dated: New York, N. Y.
May 3rd, 1961.

JOHN M. CASHIN
United States District Judge

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Upon the annexed affidavit of Charles H. Tuttle, verified May 5, 1961, upon the decision of this Court dated April 14, 1961, upon the opinion and order of Honorable John M. Cashin herein, dated May 3, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and taken by the defendants-appellees against the plaintiff-appellant are subject to grave doubt as to their legality under the Constitution and Laws of the United States; (2) such actions, if taken by the defendants-appellees in accordance with their threats so to do, would result in irreparable injury to the plaintiff-appellant; and (3) there are good and sufficient reasons to bring on this application by order to show cause,

LET the defendants-appellees, and each of them, show cause before this Court on the ..... day of May, 1961 why an order should not be entered

(1) Staying defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and determination of the plaintiff-appellant's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961 and the plaintiff-appellant's motion in the Supreme Court of the United States for leave to file a petition for a writ of mandamus directed to the Honorable Alexander Bicks,

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Honorable Edward J. Dimock and Honorable John M. Cashin and the United States District Court for the Southern District of New York; and

(2) Staying the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and determination by the United States Supreme Court of the plaintiff-appellant's petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus as aforesaid; and it is

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York as aforesaid, pending the determination of this application, and it is further

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from taking any action to hinder, harass, or in any manner interfere with the plaintiff-appellant pending the determination of this application; and it is further

ORDERED that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants-appellees, on or before the day of May, 1961 at M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., May , 1961.

U. S. C. J.

Endorsement on Order to Show Cause

The hearing of the within motion has been set for Monday, May 8, 1961 at 10:30 a.m., in room 1705, U. S. Court House, Foley Square, New York 7, New York. In the meanwhile, counsel for all parties will be expected to see to it that the status quo in the action is maintained.

May 5, 1961

A. Daniel Fusaro,
Clerk
by Niall F. O'Doherty, Chief Deputy Clerk.

Affidavit of Charles H. Tuttle in Support of Idlewild's Application

State of New York,
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, deposes and says:

I am counsel for the plaintiff-appellant, Idlewild Bon Voyage Liquor Corporation (hereafter called "Idlewild").

Nature of the Stays Sought

1. I make this application in support of Idlewild's application by order to show cause, for a stay to preserve the *status quo*, as Judge Dimock and Judge Cashin have done heretofore, and to prevent the defendants-appellees (hereafter called "the appellees") from driving Idlewild out of business with consequent irreparable injury.

2. The stay is sought pending the making and determination of (a) Idlewild's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961, and (b) Idlewild's motion in the Supreme Court for leave to file a petition for a writ of mandamus directed to Judges Bicks, Dimock and Cashin and the United States District Court for the Southern District.

3. The stays here sought would restrain the appellees from enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Law of the State of New York against Idlewild and from taking any steps to hinder, harass or interfere with Idlewild or Idlewild's business,

pending the making and determination of the aforesaid petition for certiorari and motion for leave to file a petition for a writ of mandamus.

Judge Cashin's Decision Voiding Idlewild's Attempt To Proceed In Accordance With This Court's Decision.

4. This Court's recent decision of April 14, 1961 records Idlewild's seemingly interminable quest for the relief to which this Court there said Idlewild is "entitled" (p. 1445).

5. Idlewild promptly sought to comply with this Court's decision by moving in the U. S. District Court for the Southern District of New York, on an order to show cause issued on April 18, 1961 by the Honorable John M. Cashin, for the convening of a three-judge District Court and for an injunction, both preliminary and permanent.

6. Judge Cashin granted an interim stay preserving the *status quo*, substantially in the form previously granted by Judge Dimock (Appendix to Appellant's Brief 96a-97a), pending his decision on Idlewild's application.

7. On May 3, 1961, however, Judge Cashin denied Idlewild's application to convene a three-judge District Court with an opinion which is annexed as Exhibit A.

8. Judge Cashin's opinion characterizes as "dictum" the holding of this Court that (p. 1444) "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock, and the express holding of this Court (p. 1443) that because they acted without jurisdiction, "we have no jurisdiction to entertain an appeal",—the precise *ratio decidendi* which caused this Court to dismiss Idlewild's appeal.

Affidavit of Charles H. Tuttle in Support of Application

9. Instead, Judge Cashin felt constrained to follow as "the law of the case" the very refusals by Judge Bicks and Judge Dimock to convene a three-judge District Court which this Court has just held were without jurisdiction, and as to which this Court explicitly said (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief."

10. Judge Cashin suggested that Idlewild might move for reargument before Judge Bicks or petition the United States Supreme Court for a writ of mandamus.

11. Application to Judge Bicks for reargument is highly uncertain because (a) the ten-day interval therefor has long since expired (General Rule 9(m) of the U. S. District Court for the Southern District of New York); (b) Rule 34 cited by Judge Cashin seemingly is confined to a remand for further proceedings; and (c) unhappily Judge Bicks is in the hospital, as I am informed, for serious surgery.

12. Accordingly, the last remaining remedy for Idlewild's substantial federal rights appears to be an application to the Supreme Court of the United States for a certiorari and/or a writ of mandamus.

13. If the stay here sought is granted, I will undertake to prosecute these applications to the Supreme Court with the greatest possible vigor and dispatch. If this application should be denied, however, Idlewild's resort to the Supreme Court would be rendered moot, for in the absence of a stay, the appellees would be free to pursue their previous course designed to put Idlewild out of business forthwith.

Affidavit of Charles H. Tuttle in Support of Application

Irreparable Injury To Idlewild Will Result Unless The Stay Here Sought Is Granted.

14. At every stage of Idlewild's long, and so far fruitless, quest for a remedy to protect its substantial federal rights, it has been necessary to seek successive stays by order to show cause because the appellees have been unwilling to agree to a moratorium in their unrelenting struggle to exterminate Idlewild.

15. This action was made necessary because the appellees' determination that Idlewild's business is "illegal" had dried up Idlewild's sources of supply in New York State, and Idlewild was threatened with "the prospect of closing its doors" as Judge Bicks found (188 F. Supp. at p. 436).

16. When Idlewild sought to appeal Judge Bicks' decision, the appellees instantly retaliated and attempted to choke off Idlewild's out-of-state sources of supply, first under color of law and then by overt threats to Idlewild's truckers. For this reason, Judge Dimock granted an injunction pending Idlewild's appeal to this Court against attempts by the appellees to hinder, harass or in any manner interfere with Idlewild or its business (Appendix to Appellant's Brief 93a-94a, 96a-97a).

17. After this Court's decision of April 14, 1961, Judge Cashin continued Judge Dimock's stay in effect pending his decision, thereby again preserving the *status quo*.

18. Now, however, Judge Cashin's stay has expired. By this application Idlewild merely seeks to preserve the *status quo* pending its resort to the United States Supreme Court.

Affidavit of Charles H. Tuttle in Support of Application

19. Accordingly, unless the stay here sought is granted, Idlewild will be hounded out of business by the appellees, and its substantial federal rights will be destroyed before Idlewild has had its day in the federal court to which it is entitled by statute and by the express statement of this Court.

20. This application by order to show cause is necessary because Mr. Watson, counsel for the appellees, candidly advised my associate, Stuart H. Johnson, Jr. over the telephone yesterday that the appellees would not even consent to a brief moratorium to permit Idlewild to apply by motion for the stay here sought.

21. Except as stated above, no previous application has been made for the relief here sought.

22. Accordingly, I respectfully request that the stay here sought be granted, together with such other and further relief as may be just.

(Sworn to by Charles H. Tuttle on May 5, 1961.)

Stay Order of Court of Appeals, Dated May 8, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for a stay pending application for writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is referred to the panel of this court which dismissed the appeal.

Further ordered that a stay of all proceedings shall continue until Wednesday, May 10, 1961, with leave to seek a further stay.

Stay Order of Court of Appeals, Dated May 10, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for the continuance of a stay heretofore granted by the court,

Upon consideration thereof, it is

Ordered that the stay heretofore granted on Monday, May 10, 1961, be and it hereby is extended pending disposition of the motion for a stay.

Petitioner's Notice of Alternative Application for an Order Recalling and Amending the Mandate of the Court of Appeals for the Second Circuit

Sir:

Please Take Notice that in connection with the plaintiff-appellant's pending application for a stay, the plaintiff-appellant will move in the alternative, pursuant to the request in its moving papers for such other and further relief as may be just, for an order recalling and clarifying the mandate of this Court, and amending the said mandate so as expressly to vacate the decisions and orders of Honorable Alexander Bicks and Honorable Edward J. Dimock herein for lack of jurisdiction and as nullities and/or remanding the case to the United States District Court for the Southern District of New York for further proceedings in conformity with the decision of this Court dated April 14, 1961.

Dated: New York, New York
May 9, 1961

Kelly & Schwartz
Attorneys for Plaintiff-Appellant

To:

Honorable Louis J. Lefkowitz
Attorney General of the State of New York

Injunction Order of the United States Court of Appeals for the Second Circuit, Dated May 15, 1961

INJUNCTION ORDER

WHEREAS on April 14, 1961 this Honorable Court dismissed for lack of jurisdiction a purported appeal preferred to it in the within cause; and WHEREAS by application presented to this Court on May 8, 1961 appellant is desirous of having this decision reviewed by the Supreme Court of the United States and has prayed for other relief, and is desirous of having the parties left in the same position that they were in at the time the appeal was taken until a reasonable time has elapsed within which the petition for mandamus and/or certiorari may be prepared and filed,

NOW, THEREFORE, IT IS HEREBY ORDERED That for a period of thirty days from the day of this order, and for no longer time, the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are enjoined from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and filing of the plaintiff-appellant's petition for mandamus and or certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961; and

The defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are further enjoined for said thirty days from taking any action, to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and filing in the United States Supreme Court of the plaintiff-appellant's petition for a writ of mandamus and/or certiorari.

And in all other respects plaintiff-appellant's prayers for relief are denied.

J. EDWARD LUMBARD
STERRY R. WATERMAN
U. S. C. JJ.
J. WARREN MADDEN
Judge, U. S. Court of Claim

May 15, 1961

Federal Statutes and Regulations

(a) 28 U.S.C. §2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(b) 28 U.S.C. §2284 provides in pertinent part:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

• • •

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent

irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

(c) 28 U.S.C. §1337 provides in pertinent part:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

(d) 28 U.S.C. §1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

(e) 28 U.S.C. §1291 provides in pertinent part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *. * * * except where a direct review may be had in the Supreme Court."

(f) 28 U.S.C. §1292(a) provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * refusing * * * injunctions, * * * except where a direct review may be had in the Supreme Court."

[fol. 148] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 149]

SUPREME COURT OF THE UNITED STATES

No. 138—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

THOMAS E. ROHAN ET AL.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 180, Misc. and a total of two hours is allowed for oral argument. The cases are set for argument immediately following Nos. 90 and 91.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 150]

SUPREME COURT OF THE UNITED STATES

No. 180 Misc.—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

HONORABLE ALEXANDER BICKS ET AL., JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS—October 9, 1961

On Consideration of the motion for leave to file a petition for writ of mandamus herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted. The case is consolidated with No. 138 and a total of two hours is allowed for oral argument. The cases are set for argument immediately following Nos. 90 and 91.

[fol. 151]

SUPREME COURT OF THE UNITED STATES

No. 138—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

THOMAS E. ROHAN ET AL.

ORDER OF SUBSTITUTION—January 8, 1962

On Consideration of the motion to substitute Robert E. Doyle, John C. Hart, and Benjamin H. Balcom in the place of Grant F. Daniels, Thomas E. Rohan, and Samuel H. Birnbaum as parties respondent,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.